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Supreme Court of the United States

October Term, 1966

No. 851

DAVID J. MILLER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on October 13, 1966.

Citations to Opinions Below

There are two opinions by the United States District Court for the Southern District of New York, both by Hon. Harold R. Tyler, Jr., United States District Judge. The first opinion, denying petitioner's motion to dismiss, is

printed in the Appendix hereto, PA24,* and is reported at 249 F. Supp. 259. The second opinion of the District Court, finding the petitioner guilty after trial, is unreported and is printed at PA36. The opinion of the United States Court of Appeals is printed at PA3 and is reported at 358 F. 2d 696 (2d Cir. 1966).

Jurisdiction

The judgment of the United States Court of Appeals was entered on October 13, 1966. PA1. On November 9, 1966, Mr. Justice Harlan issued an order extending the time in which to file this petition for a writ of certiorari up to and including December 12, 1966. The jurisdiction of this court is invoked under 28 U. S. C. §1254 (1).

Questions Presented for Review

1. Whether the August 30, 1965 amendment to Section 12(b)(3) of the Universal Military Service and Training Act, 50 U. S. C. App. §462(b)(3), which made it a felony to knowingly destroy or knowingly mutilate a Selective Service certificate, is an unconstitutional abridgment of freedom of expression guaranteed by the First Amendment, on its face, because the legislative history unequivocally reveals that the amendment to the statute was deliberately enacted for the purpose of suppressing dissent.

2. Whether, and if so to what extent, courts should examine the expressed legislative purpose to determine the

* "PA...." refers to the Appendix hereto.

constitutionality of a statute which affects freedom of expression.

3. Whether the statute, as applied to the facts in this case, is an unconstitutional abridgment of freedom of expression because the conduct which it sought to punish was a peaceful act of symbolic speech protected under the clear and present danger test, which the Court of Appeals refused to apply, but likewise protected under the balancing test, which the Court of Appeals incorrectly applied.

4. Whether the Court of Appeals erred in concluding that this Court no longer applies the clear and present danger test, either wholly, or in part, and has directed that the only standard to be applied in determining the constitutionality of statutes and prosecutions which affect First Amendment rights is the balancing test.

5. Whether the statute serves any legitimate purpose in the administration of the Selective Service System, or any other rational legislative purpose, and whether, in the absence of any legitimate or rational legislative purpose, the statute is an unconstitutional deprivation of individual liberty without due process of law, in violation of the Fifth Amendment.

Constitutional and Statutory Provisions Involved

This case involves the First and Fifth Amendments to the United States Constitution.

The statute involved is P. L. 89-152, 79 Stat. 586, enacted on August 30, 1965, which adds certain language to Section

12(b)(3) of the Act, 50 U. S. C. App. §462(b)(3), as follows:

"(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title (sections 451-454, 455-471 of this Appendix); or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title (said sections), or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title (said sections) or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such

certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury." (Language inserted by amendment emphasized.)

Statement of the Case

Petitioner was indicted in the United States District Court for the Southern District of New York on October 19, 1965. He was charged with knowing destruction and mutilation of a Selective Service Notice of Classification in violation of 50 U. S. C. App. §462(b)(3), as amended.

The proposed amendment, which became law on August 30, 1965, was introduced in the House by Rep. Rivers on August 5, 1965.* It was favorably reported by the House Committee on Armed Services on August 9, 1965. H. Rep. No. 747, 89th Cong., 1st Sess. The House Report stated that the Committee was:

> "* * * aware of, and shares in, the deep concern expressed throughout the Nation over the increasing incidences in which individuals and large groups of individuals openly defy and encourage others to defy the authority of their Government by destroying or mutilating their draft cards." (PA41.)

The next day, Cong. Rivers, the bill's sponsor, explained the purpose of the bill on the floor:

> "It is a straightforward clear answer to those who would make a mockery of our efforts in South Vietnam by engaging in the mass destruction of draft cards." (Cong. Rec.—House, August 10, 1965, at 19135; PA45.)

* The entire legislative history is documented in the Appendix hereto. PA40-PA60.

The bill was enacted in the House on August 10, 1965 by a vote of 393 to 1. PA50-PA54. On the same day Sen. Thurmond introduced an identical bill in the Senate, stating:

> "It is not fitting for our country to permit such conduct while our people are giving their lives in combat with the enemy." (Cong. Rec., August 10, 1965, at 19012; PA55.)

The report of the Senate Committee on Armed Services, submitted on August 12, 1965 by Sen. Thurmond stated that the bill resulted from the Committee taking notice "of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy." Sen. Rep. No. 589, 89th Cong., 1st Sess. PA 56. The bill passed the Senate that same day. PA60. It received Presidential approval on August 30, 1965. P. L. 89-152, 79 Stat. 586.

Petitioner's violation of the amended statute occurred on October 15, 1965 at a public meeting held in New York City for the purpose of protesting United States foreign and military policy and the military draft. Since the meeting was held on one of the streets adjoining the United States Army Induction Center at 39 Whitehall Street, New York City, it was referred to by its sponsors as the "Whitehall Speakout". (Appellant's Appendix in Court of Appeals, pp. 37a-39a.)* The meeting was held with New York City Police authorization, a permit for sound amplification equipment having been duly applied for and received. 39a. A United States flag was in evidence as well as a banner

* "....a" refers to Appellant's Appendix in the Court of Appeals, a certified copy of which is being filed in lieu of a transcript of the record, pursuant to Rule 21(3).

which read "End the War in Vietnam." 46a. A large number of policemen were present, and efforts were made, via Police barricades, to separate persons described as "hecklers" from the main body of the audience. 63a.

The meeting was well-publicized. 37a, 40a-45a. An informational leaflet distributed by the sponsors before and after the meeting read in part:

> "* * * there will be *no civil disobedience.* Our job * * * is to communicate our views about the draft and the war in Vietnam to Selective Service employees, young men facing the draft and the many spectators in the street—and to do this as effectively as we can." (116a)

A number of speakers addressed the meeting, including petitioner, who was an advertised speaker, identified as being from the Catholic Worker. 116a. When petitioner was called to the microphone he said "he was not going to give a prepared speech." 69a. He also said he "was a Catholic pacifist and as such was opposed to all wars" and that he was "particularly opposed to war in Vietnam, and the conscripting of young men for that war." He stated that he "would let the action of burning [his] draft card speak for itself". He set fire to his Notice of Classification while standing on the platform in front of the audience. 69a.

Petitioner's symbolic act was characterized by other witnesses as being the "most eloquent statement of the meeting", as receiving "tremendous applause" and likewise "tremendous booing" from the hecklers. 63a. Petitioner stated at the trial that he burned his card "as a

symbolic protest in opposition to conscription, to the Selective Service System, to the war in Vietnam and to the draft card burning law itself." 76a.

Petitioner did not urge others to burn their cards. 28a, 51a, 70a. There was no testimony that anyone else burned draft cards at the meeting. 29a, 52a, 70a. Petitioner did not urge anyone to march anywhere or to do anything. 52a, 70a.

Petitioner testified that the decision to burn his draft card was entirely his own, and although he had been thinking about it earlier, he did not make the final decision until the night before he spoke. 67a, 70a. At the time of his appearance at the meeting, and prior thereto, he was a staff member of the Catholic Worker Movement which consists of a small number of lay Catholics who live in voluntary poverty and serve the poor in the Bowery section of New York City. The Catholic Worker Movement is also involved, according to petitioner's testimony, in working for peace, civil rights and social justice. He shared the views of the Movement in his opposition to war in any form, to the war in Vietnam and to compulsory military service. 64a, 65a.

Petitioner was arrested two days after the meeting, on October 17, 1965, in Hooksett, New Hampshire, while proceeding to St. Anselm's College as a member of a Catholic Worker peace team that had been invited to discuss pacifism with the student body. 71a. He was indicted on October 19, 1965. He pleaded not guilty on October 27, 1965. A motion to dismiss the indictment was timely made

and denied by written opinion of Judge Tyler on December 16, 1965. PA24. Petitioner was tried before Judge Tyler, without a jury, on February 9 and 10, 1966, and found guilty. PA36. He was sentenced by Judge Tyler on March 15, 1966 to a term of imprisonment of three years, execution suspended, and placed on probation for two years subject to the court's standing probation order plus certain special conditions of observance of Selective Service Regulations and obedience to orders of his Selective Service Local Board. PA21.

The judgment and opinion of the Court of Appeals, rendered October 13, 1966, affirmed the conviction.*

Reasons for Granting the Writ

Certiorari should be granted because the Court of Appeals has decided important questions of Federal Constitutional law which should be settled by this Court, particularly since some of its holdings are in conflict with applicable decisions of this Court.

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* This is the first case of a conviction under the draft-card burning statute to be presented to this court. There have been several other convictions: *U. S.* v. *Smith,* 249 F. Supp. 515 (S. D. Iowa 1966) (sentence of probation), aff'd per curiam, —— F.2d —— (8th Cir., Nov. 7, 1966); *U. S.* v. *Edelman, et al.* (unreported) (S. D. N. Y. 1966) (three defendants sentenced to six months), appeal pending, 2d Cir.; *U. S.* v. *O'Brien* (unreported) (D. Mass. 1966) (defendant sentenced to 1 to 4 years under Youth Correction Act), appeal pending, 1st Cir.; *U. S.* v. *Reed* (unreported) (D. Mass. 1966) (defendant sentenced to three years, to run concurrently with three year sentence for refusal to report for induction). There have also been guilty pleas: *U. S.* v. *Wilson* (unreported) (S. D. N. Y. 1966) (sentence of probation); *U. S.* v. *Sullivan* (unreported) (S. D. N. Y. 1966) (defendant sentenced to 1 year). At least one other prosecution is pending: *U. S.* v. *Kiger,* S. D. N. Y.

I

Incensed by reports of draft card burnings by young men who were thereby symbolically expressing their opposition to the Vietnam War and the draft, Congress hurriedly amended the Universal Military Training and Service Act to make it a felony to knowingly destroy or knowingly mutilate a Selective Service certificate. There were no legislative hearings. There were no requests for the legislation by the Selective Service System, or by any other agency concerned with national defense or military manpower. Nor were their views or comments solicited. The only legislative purpose, unequivocally expressed by statements of the sponsors and by committee reports in both houses, was to punish this form of symbolic dissent.

The Court of Appeals erroneously refused to acknowledge this clearly revealed unconstitutional purpose. It thereby validated a statute which, by its legislative history, is self-evidently a law abridging freedom of speech.

The entire legislative history is set forth in the Appendix hereto. PA40-PA60. The Court of Appeals acknowledged that "portions" of it,

> "particularly remarks by two Representatives (including the sponsor of the bill in the House)—indicate a desire to suppress political dissent"

PA9, but also pointed out that

> "the more authoritative committee reports also show a concern that destruction of draft cards 'represents a

potential threat to the exercise of the power to raise and support armies.' "[1]

The Court of Appeals' inference that only "portions" of the legislative history indicate a desire to suppress political dissent is not justified by a fair reading of all of the legislative history. The two representatives, Mr. Rivers (the House sponsor), and Mr. Bray, were the *only* ones who spoke about the bill on the House floor. In the Senate only Sen. Thurmond (the Senate sponsor) spoke. This is how he expressed the "need" for the legislation:

> "Recent incidents of mass destruction of draft cards constitute open defiance of the warmaking powers of the government and have demonstrated an urgent need for this legislation." (Cong. Rec.—Senate, Aug. 13, 1965, at 19669) (PA59).

The Court of Appeals apparently concluded that the presence of the "power to raise and support armies" phrase in the Senate Report made the legislative history "inconclusive."

It is hard to imagine how much more conclusive the legislative history could be. Petitioner submits that the attempt by the Court of Appeals to paint a picture of un-

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1. The Court of Appeals refers at this point, via footnote 8, PA9, to both the Senate and House Reports. However, the quoted language comes only from the Senate Report, in the following context:

> "The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies." (PA57).

No such language appears in the House Report.

certainty is not borne out by the record. With all respect, by characterizing the legislative history as "inconclusive" the court seeks to paper over a real problem which it would have had to reach, had it acknowledged that the legislative history left no conclusion other than "a desire to suppress political dissent." That problem is whether or not it could strike down the statute as unconstitutional on its face, if it were convinced that the legislative purpose was unconstitutional.

II

The Court of Appeals expressed uncertainty as to whether the constitutionality of this statute—or any statute—on its face could be successfully attacked by reference to legislative history. Thus, the opinion states in one place that

> "going behind the terms of a statute to divine the collective legislative motive for its enactment is rarely, if ever, done by a court." (PA8).

It states later:

> "We need not go so far as to say that an apparently innocuous statute can never be successfully attacked on the ground that the 'real' congressional motive behind it was impermissible. We say only that the occasions cited to us where this has allegedly been done successfully are few, [and] that they are in several ways distinguishable * * *" (PA11).[2]

2. The court distinguishes *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936), and *Lamont* v. *Postmaster-General*, 381 U. S. 301 (1965), aff'g sub nom. *Heilberg* v. *Fixa*, 236 F. Supp. 405 (N. D. Calif., S. Div. 1964) on the grounds that the statutes successfully attacked therein were directly concerned with "regulation

By the use of the word "motive" the court confused the essential difference between that which motivates an individual legislator to cast his vote, and the formal expression of collective legislative purpose via Committee reports, sponsors' explanatory statements, and similar authoritative sources. This distinction was elucidated by Circuit Judge Soper in *National Association for the Advancement of Colored People* v. *Patty*, 159 F. Supp. 503, 515, n. 6 (E. D. Va. 1958); rev'd other grounds, sub nom. *Harrison* v. *N. A. A. C. P.*, 360 U. S. 167 (1959):

> "While it is well settled that a court may not inquire into the legislative motive (Tenney v. Brandhove, 341 U. S. 367, 377, 71 S.Ct. 783, 95 L.Ed. 1019), it is equally well settled that a court may inquire into the legislative purpose. (See Baskin v. Brown, 4 Cir., 174 F. 2d 391, 392-393, and Davis v. Schnell, D. C., 81 F. Supp. 872, 878-880, affirmed 336 U. S. 933, 69 S. Ct. 749, 93 L.Ed. 1093, in which state efforts to disenfranchise Negroes were struck down as violative of the Fifteenth Amendment.) Legislative motive—good or bad—is irrelevant to the process of judicial review; but legislative purpose is of primary importance in determining the propriety of legislative action, since the purpose itself must be within the legislative competence, and the methods used must be reasonably likely to accom-

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of ideas or the means of communicating them", PA9, while here the statute "on its face" concerns administration of the draft. But the Court of Appeals did not distinguish *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960) and *NAACP* v. *Alabama*, 357 U. S. 449 (1958), which were also cited to the court as successful constitutional attacks on statutes via legislative history, in neither of which the statute "on its face" concerned regulation or communication of ideas. Moreover, the validity of this distinction may be seriously questioned. If the legislative history of a statute unequivocally reveals a purpose of suppressing political dissent, the avoidance of blatantly repressive language should not immunize it from constitutional attack. *Cf. Lane* v. *Wilson*, 307 U. S. 268 (1939).

plish that purpose. Because of this necessity, a study of legislative purpose is of the highest relevance when a claim of unconstitutionality is put forward. Usually a court looks into the legislative history to clear up some statutory ambiguity, as in Davis v. Schnell, D. C., 81 F. Supp. at page 878; but such ambiguity is not the *sine qua* for a judicial inquiry into legislative history. See the decision in Lane v. Wilson, 307 U. S. 268, 59 S. Ct. 872, 83 L.Ed. 1281, in which the Supreme Court showed that the state statute before the court was merely an attempt to avoid a previous decision in which the 'grandfather' clause of an earlier statute had been held void."[3]

Circuit Judge Brown, dissenting in *Gomillion* v. *Lightfoot*, 270 F. 2d 594, 608 (5th Cir. 1959), reversed 364 U. S. 339 (1960), admonished his fellow Circuit Judges that

> "We need not be that 'blind' court that Mr. Chief Justice Taft described as unable to see what 'all others can see and understand * * *' Bailey v. Drexel Furniture Co. [Child Labor Tax Case], 1922, 259 U. S. 20, 37 * * *"

The majority Judges in the 5th Circuit in *Gomillion* held themselves barred from examining what they referred to as the legislative motive. To this, Judge Brown responded:

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3. *Cf.* Mr. Justice Douglas' concurring opinion in *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 445-446 (1963):

> "The Virginia Act * * * reflects a legislative purpose to penalize the NAACP because it promotes the desegregation of the races.
>
> "* * * Judge Soper, writing for the Court in NAACP v. Patty * * * did not indulge in guesswork. He reviewed the various steps taken by Virginia to resist our *Brown* decision * * * [T]hey made clear the purpose of the present law—as clear a purpose to evade our prior decision as was the legislation in *Lane* v. *Wilson* * * *"

> "What the Legislature of Alabama, as distinguished from its members, *intended* and what the *purpose* of the Legislature, as distinguished from its members, was in the enactment of this law is then a traditional matter for concern to the Judiciary. Obviously the Legislature of Alabama could have had the purpose of discriminating against Negro voters. Many states have had such purpose as the cases discussed in Part V, *supra*, attest. All that Doyle can mean is that in the judicial process of ascertaining *legislative* purpose and intention the individual motives and expression of the individual members is not pertinent. But where the collective purpose and intention of the body is expressly stated or is ascertained on a trial by the exercise of traditional rules of statutory construction in the light of record facts, the judicial ascertainment and declaration of that purpose and intention is not prohibited by the fact that individual legislators, either in legislative chambers or through the press, may have uttered statements of startling candor." (Footnote omitted.) *Id.* at 610.

Statements of precisely such startling candor were uttered by Representative Rivers and Senator Thurmond in enacting the statute here under attack. This Court should recognize them for what they were, and at the same time clarify the permissibility of lower courts doing likewise in appropriate cases.

III

Petitioner contends that the ceremonial burning of a draft card at a public meeting, for the purpose of dramatizing an anti-war, anti-draft speech, is symbolic speech within the protection of the First Amendment. This Court has held that protected symbolic speech includes such conduct as the display of a red flag, *Stromberg v. California*, 283

U. S. 359 (1931); peaceful picketing, *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), *Carlson* v. *California*, 310 U. S. 106 (1940), *Milk Wagon Drivers Union* v. *Meadowmoor*, 312 U. S. 287 (1941), cf. *Cox* v. *Louisiana*, 379 U. S. 536, 555 (1965); and the refusal to obey a statute compelling school children to salute the flag, *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943). The "prevailing opinion" of this Court in *Brown* v. *Louisiana*, 383 U. S. 131 (1966), and the concurring opinion of Mr. Justice Harlan in *Garner* v. *Louisiana*, 368 U. S. 157, 201-02 (1961), have expressed the view that peaceful civil rights demonstrations, a "sit-in" in *Garner*,[4] and a "stand-up" in *Brown*,[5] are likewise protected as symbolic speech. First Amendment rights "are not confined to verbal expression. They embrace appropriate types of action * * *." *Brown* v. *Louisiana*, at 142.[6]

4. "Such a demonstration, in the circumstance of these two cases, is as much a part of the 'free trade in ideas', *Abrams* v. *U. S.*, 260 U. S. 616, 630 (Holmes, J. dissenting), as is verbal expression, more commonly thought of as 'speech.' It, like speech, appeals to good sense and to 'the power of reason as applied through public discussion', *Whitney* v. *California*, 274 U. S. 357, 375 (Brandeis, J. concurring), just as much as, if not more than, a public oration delivered from a soap box at a street corner." *Ibid.* *Cf.* Kalven, *The Negro and the First Amendment* 131 (1965).

5. Mr. Justice Brennan in his Concurring Opinion in *Brown*, 383 U. S. at 146, appears to adopt the views of Mr. Justice Harlan in *Garner*. See also Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment," 79 Harv. L. Rev. 1, 4 (1965).

6. Summarizing the symbolic speech decisions of this Court, Chief Judge Sobeloff has written:

> "The First Amendment affords protection not merely to the voicing of abstract opinions upon public issues. It also protects implementing conduct which is in the nature of advocacy."

National Labor Relations Board v. *International Longshoremen's Association*, 332 F. 2d 992, 999 (4th Cir. 1964).

The Court of Appeals devoted considerable attention to discussing the symbolic speech doctrine. PA11-PA14. It posed a number of interesting hypothetical questions about different forms of conduct which might be characterized as symbolic speech. But it did not rule on whether or not the draft-card burning ritual was or was not symbolic speech.[7] Instead, it proceeded to discuss the proper constitutional test, ruled that the balancing test was to be applied, and held that even if the conduct in question was symbolic speech, it was not that kind of symbolic speech which was protected by the First Amendment. PA15.

Petitioner urges that the court below erred in not finding that the ceremonial burning of a draft card was well within the long line of decisions of this Court which have protected symbolic speech.

Moreover, petitioner submits that a decision by this Court as to the proper metes and bounds of protected symbolic speech is a constitutional issue of public importance, separate and apart from the issue of the proper constitutional test to be applied. With the proliferation of public demonstrations expressing dissent to governmental authorities on many questions, and the constant emergence of new and unprecedented forms of demonstration,[8] there is an obvious public interest in this Court's providing guide-

7. "We are not at all sure that destroying a draft card, even at a public rally, must be regarded as an exercise of speech, but we are willing to assume it *arguendo* * * *." PA14.

8. Compare *Garner* v. *Louisiana*, 368 U. S. 157 (1961); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Cox* v. *Louisiana*, 379 U. S. 536 (1965); *Brown* v. *Louisiana*, 383 U. S. 131 (1966); *Adderley* v. *Florida*, —— U. S. ——, 35 U. S. L. Week 4013 (Nov. 14, 1966).

lines for the benefit of Congress, police authorities, and potential demonstrators.[9]

IV

Petitioner's counsel are not aware of any other case where a Court of Appeals has so explicitly ruled that it may not apply the clear and present danger test because of its reading of the decisions of this Court.[10] PA16. Obviously, if the Court of Appeals was in error in this respect, its judgment must be reversed.[11]

Moreover, there can hardly be a constitutional question of greater public importance in the entire area of First Amendment rights, then the need for clarification by this Court as to whether or not lower courts, in reviewing Governmental action in the area of the First Amendment, must apply the balancing test, or the clear and present danger test, or are free to apply either.[12]

Petitioner urges that under either standard the verbal conduct of which he stands convicted is protected by the

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9. *Cf. Turner* v. *New York*, —— U. S. ——, 35 U. S. L. Week 3147 (Oct. 25, 1966), where this Court granted certiorari to review convictions of disorderly conduct arising from an anti-Vietnam war demonstration in Duffy Square, in midtown Manhattan.

10. The court held that such decisions "seem to require" the use of the balancing test. It relied principally on *American Communications Assn.* v. *Douds*, 339 U. S. 382 (1950), holding that its exposition of the balancing test is still valid notwithstanding *United States* v. *Brown*, 381 U. S. 437 (1965).

11. This Court has applied the clear and present danger test most recently in *Wood* v. *Georgia*, 370 U. S. 375 (1962). See also *Thomas* v. *Collins*, 323 U. S. 516 (1945); *Taylor* v. *Mississippi*, 319 U. S. 583 (1943); *Bridges* v. *California*, 314 U. S. 252 (1941); *Herndon* v. *Lowry*, 301 U. S. 242 (1937).

12. For a critique of the balancing test see Frantz, *The First Amendment in the Balance*, 71 Yale L. J. 1424 (1962). For an analysis of both tests, which expresses a preference for the clear and present danger test, see Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. J. 877, 910-912, 912-914 (1963).

First Amendment and the conviction must be reversed. If this Court holds that the clear and present danger test is not to be applied, and the balancing test is to be applied, it is of equal public importance that the balancing test should be properly applied so that restrictions on freedom of speech shall be kept within proper constitutional limits.[13]

V

Petitioner urges that the statute, both on its face and as applied, is an unconstitutional deprivation of liberty without due process of law, since the statute serves no rational legislative purpose. The Court of Appeals misinterpreted petitioner's argument based on substantive due process as being no more than an attack on the wisdom of the statute. PA20.

It is true that the due process clause may no longer be used to strike down industrial or regulatory laws "because they may be unwise * * *" *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488 (1955). But where a statute involves an infringement of individual liberty, as distinguished from economic or business regulation,[14] the due process clause

13. The Court of Appeals' weighing of the government-interest side of the balance, PA17, consists of the itemization of a number of possible advantages which retention of the Selective Service Notice of Classification might have for the *registrant*. But in terms of benefit to the *government*, so as to legitimatize the requirement, it refers only to "fire or other disaster" necessitating reconstruction of files, and to "extreme emergency (*e.g.*, a call-up by radio)". The trial court, although it referred in both opinions to the administrative advantages to the Selective Service System, at no point specified even a single one. See PA30, PA31, PA39. The Court of Appeals' attempt to fill this interstice is not persuasive.

14. *Cf. Marsh* v. *Alabama*, 326 U. S. 501, 509 (1946); *Thomas* v. *Collins*, 323 U. S. 516, 529-530 (1945); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115 (1943); *A. F. of L.* v. *Swing*, 312 U. S. 321, 325 (1941); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *U. S.* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4 (1938).

requires a justification of the statute's legitimate legislative purpose. See *Griswold* v. *Connecticut,* 381 U. S. 479, 482 (1965); *Aptheker* v. *Secretary of State,* 378 U. S. 500, 505 (1964); *Bolling* v. *Sharpe,* 347 U. S. 497 (1954); *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925); *Meyer* v. *Nebraska,* 262 U. S. 390, 399-400 (1923).[15]

In its defense of individual liberty, substantive due process establishes limitations "upon all powers of Congress, even the war power." *Galvan* v. *Press,* 347 U. S. 522, 530 (1954). This Court should grant certiorari to dispel the uncertainty which apparently continues to persist, concerning the scope of this important constitutional limitation.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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15. *Cf.* Mr. Justice Goldberg, concurring in *Griswold* v. *Connecticut, supra* at 492:

> "As any student of this Court's opinions knows, this Court has held, often unanimously, that the 5th and 14th Amendments protect certain fundamental personal liberties from abridgment by the Federal Government or the States". (citing cases)

Judgment of Affirmance of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of October one thousand nine hundred and sixty-six.

Present:

Hon. J. EDWARD LUMBARD, Chief Judge,
Hon. LEONARD P. MOORE,
Hon. WILFRED FEINBERG, Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID J. MILLER,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Judgment of Affirmance of the United States Court of Appeals

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

Judgment Entered 11-2-66
John J. Olear, Jr.
Clerk

A true copy,
A. Daniel Fusaro
Clerk

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

DAVID J. MILLER,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge*,
MOORE and FEINBERG, *Circuit Judges.*

FEINBERG, *Circuit Judge*:

This case raises perplexing issues of whether symbolic conduct is speech embraced by the First Amendment and the extent of its protection thereunder. The appeal challenges the constitutionality of a federal statute prohibiting the destruction of Selective Service certificates; the ultimate question before the court is the power of Congress to enact the legislation. The constitutional issues are raised by David J. Miller, who appeals from a judgment convicting him of knowingly destroying a Selective Service System Notice of Classification. Appellant was tried without a jury before Judge Tyler in the Southern District of New York. Taking into account Miller's sincerity and background, the judge suspended execution of a sentence of three years' imprisonment and placed appellant on two years' probation.[1] We hold the statute constitutional and affirm the conviction.

I. The Statute and the Facts

Appellant was convicted of violating section 12(b)(3) of the Universal Military Service and Training Act ("the

1. Special conditions of probation were that appellant obtain and carry a classification notice and obey orders of his draft board, probation to terminate if he entered military service.

Act''), as amended by 79 Stat. 586 (1965), 50 U. S. C. App. §462(b)(3) (Supp. I, 1965). In August 1965, that section was amended to prohibit the knowing destruction or mutilation of a Selective Service certificate; the amended statute was the basis of appellant's conviction.[2] Judge Tyler found it undisputed that on October 15, 1965, at a street rally near the Army Building at 39 Whitehall Street in Manhattan, appellant burned his ''draft card.''[3] Appellant performed this act in the course of giving a speech; he believed

2. Section 12(b) of the Act provides:

> Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification of representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title, or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title, or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury. [Emphasis added.]

3. The certificate was actually a Notice of Classification (SSS Form No. 110). See Judge Tyler's opinion disposing of pre-trial motions, 249 F. Supp. 59 (S. D. N. Y. 1965), and our discussion *infra*, pp. 3416-19.

the burning to be a symbolic protest against the draft, the military action in Vietnam, and "the draft card burning law itself." The court further found that other methods of speech used at the rally, although less dramatic than appellant's action, served as reasonably effective communication of the ideas involved.[4] Before considering appellant's arguments it is instructive to examine the history of the statute under discussion.

Even prior to the August 1965 amendment, section 12(b) of the Act stringently regulated the physical certificates issued by the Selective Service System. It was thus illegal —with improper intent—to transfer a certificate to aid a person in making a false identification or representation, or to possess a certificate not duly issued to oneself for those purposes, or to forge, alter "or in any manner" change a certificate or any notation validly inscribed thereon, or to photograph or make an imitation of a certificate for false identification purposes, or to possess a counterfeited or altered certificate. In addition, under the authority delegated him by Congress (section 10(b)(1) of the Act), the President had promulgated a regulation requiring those who have been classified by a local board to have in their personal possession at all times the Notice of Classification (SSS Form No. 110), except when entering upon active duty into the Armed Forces, when the certificate must be surrendered for destruction. 32 C. F. R. §1623.5 (1962). Violation of this regulation was made a felony by section 12(b)(6) of the Act.[5]

4. *United States* v. *Miller*, 65 Cr. 937, S. D. N. Y., March 7, 1966. For articles dealing with the case and the statute, see Forkosch, *Draft Card Burning—Effectuation and Constitutionality of the 1965 Amendment*, 32 Brooklyn L. Rev. 303 (1966); Rachlin, *Draft Cards and Burning the Constitution*, *id.* at 334; 34 Fordham L. Rev. 717 (1966); 11 N. Y. L. F. 584 (1965).

5. The Registration Certificate (SSS Form No. 2, discussed *infra*) was also required to be in the registrant's personal possession at all times. 32 C. F. R. §1617.1 (1962).

The Notice of Classification itself is a white card, about the thickness of a postcard, and about two inches by three inches in size. The front of the Notice burned by appellant was in the following form:

SELECTIVE SERVICE SYSTEM

NOTICE OF CLASSIFICATION

_____

(First name) (Middle initial) (Last name)

Selective Service No.

is classified in Class _____

until _____

☐ by Local Board,

☐ by Appeal Board
vote of _____ to _____

☐ by President

_____

(Date of mailing)

_____

(Member or clerk of local board)

_____

(Registrant's signature)

SSS Form No. 110 (Revised 5-7-63)
(Approval not required)

The back provided:

(Local Board Stamp)

You are required to have this notice, in addition to your Registration Certificate, on your person at all times and to surrender it upon entering active duty in the Armed Forces.

The law requires you to notify your local board in writing (1) of every change in your address, physical condition, and occupational, marital, family, dependency, and military status, and (2) of any other fact which might change your classification within 10 days after it ocurs.

Your Selective Service Number, shown on the reverse side, should appear on all communications with your local board. Sign this form immediately upon reecipt.

FOR INFORMATION AND ADVICE, GO TO ANY LOCAL BOARD

The Registration Certificate referred to (SSS Form No. 2) is given to all Selective Service registrants when they register; important information contained on the Notice of Classification does not appear on the Registration Certificate, *i.e.*, the registrant's classification, who classified him, and the vote, if by an Appeal Board. These facts do not develop until after a registrant has received Form No. 2. See 32 C. F. R. §§1617.1, 1622.1(e), 1623.1(a) (1962); Forkosch, *supra* note 4, at 303-04. See also 32 C. F. R. §1627.3 (Supp. 1966) (significance of vote).

To summarize, the Act and a regulation, even before the 1965 amendment was passed, required the Notice containing a registrant's classification to be in his possession at all times, and imposed stringent penalties for tampering with the certificate and in other ways subjecting it to abuse.

II. Constitutional Arguments

Since appellant does not claim here that he did not violate the statute—nor is there any room for doubt on this score—and since no procedural infirmities are raised, we turn to the constitutional arguments advanced. Appellant contends that the 1965 amendment is unconstitutional (1) on its face, because its legislative history establishes that it was enacted deliberately to suppress dissent; (2) as applied to the facts of this case, because the conduct it punishes this defendant for is symbolic speech protected by the First Amendment; and (3) under the Fifth Amendment, because it serves no rational legislative purpose.[6]

As to the first contention, going behind the terms of a statute to divine the collective legislative motive for its enactment is rarely, if ever, done by a court. Thus, in *Sonzinsky* v. *United States*, 300 U. S. 506, 513-14 (1937), the Supreme Court stated that "inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts." See *Barenblatt* v. *United States*, 360 U. S. 109, 132 (1959); *United States* v. *Kahriger*, 345 U. S. 22, 27 (1953) (allegation that improper motive was revealed in legislative history); *Tenney* v. *Brandhove*, 341 U. S. 367, 377 (1951); *Daniel* v. *Family Security Life Ins. Co.*, 336

6. Constitutional questions were duly preserved for review by appropriate motions below; other arguments in the trial court, *e.g.*, that a Notice of Classification is not a "certificate' under 50 U. S. C. App. §462(b)(3), have apparently been abandoned.

U. S. 220, 224 (1949). Ordinarily, if Congress has power to act in a field, judicial inquiry ends so long as the statute does not on its face infringe a constitutional right.[7] The 1965 amendment appears to meet this test. Congress clearly has power under Article I, section 8 of the Constitution to "raise and support Armies," and the Universal Military Training and Service Act and the 1965 amendment thereto are, in their terms, proper exercises of that power. See *Lichter* v. *United States*, 334 U. S. 742, 756-58 n. 4 (1948); *Selective Draft Law Cases*, 245 U. S. 366 (1918). On its face, the amended statute here attacked concerns administration of the draft, not regulation of ideas or the means of communicating them. This distinguishes such cases as *Lamont* v. *Postmaster General*, 381 U. S. 301 (1965), and *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936), relied on by appellant.

To prove the "real" congressional purpose of the 1965 amendment, appellant resorts to its legislative history, a source frequently used to construe the terms of a statute. But that history is inconclusive. Even though portions—particularly remarks by two Representatives (including the sponsor of the bill in the House)—indicate a desire to suppress political dissent, the more authoritative committee reports also show a concern that destruction of draft cards "represents a potential threat to the exercise of the power to raise and support armies."[8] It may even be conceded that the amendment was prompted by widely publicized burnings of draft cards occurring in demonstrations against

7. We agree that when a First Amendment right is involved, the impact of the statute as applied must also be examined (see pp. 3422-31 *infra*); but this is a wholly different argument leading to a different inquiry.

8. *Compare* 111 Cong. Rec. 19135 (daily ed. Aug. 10, 1965) *with* S. Rep. No. 589, 89th Cong., 1st Sess. 2 (1965), *and* H. R. Rep. No. 747, 89th Cong., 1st Sess. 2 (1965).

this country's Vietnam policy.[9] But neither does that control disposition of the case. *People* v. *Stover*, 12 N. Y. 2d 462, appeal dismissed, 375 U. S. 42 (1963), involved a bizarre display of offensive objects on a clothesline in a residential area to protest high property taxes. Thereafter, the City of Rye enacted an ordinance which, in effect, prohibited clotheslines in a front or side yard abutting a street. On appeal from a conviction for violation of the ordinance, the New York Court of Appeals said (per Fuld, *J.*, 12 N. Y. 2d at 466):

> It is a fair inference that adoption of the ordinance before us was prompted by the conduct and action of the defendants but we deem it clear that, if the law would otherwise be held constitutional, it will not be stricken as discriminatory or invalid because of its motivation. (Cf. *Town of Hempstead* v. *Goldblatt*, 9 N Y 2d 101, affd. 369 U. S. 590.)

The 1965 amendment clearly was intended to stop draft card burnings, but on its face the statute is narrowly drawn and does not discriminate between card-burning as protest or as something unrelated to symbolic communication. Another factor illustrates the difficulty here of adverting to motive, rather than looking primarily to the terms of the statute itself, in testing its constitutionality on its face. The duty to keep Selective Service certificates on one's person has been in existence for many years and has been held constitutional. *United States* v. *Kime*, 188 F. 2d 677 (7th Cir.), cert. denied, 342 U. S. 823 (1951) (registrant claimed that religious belief motivated him not to carry certificate). Appellant does not claim that this requirement was aimed

9. See Finman & Macaulay, *Freedom to Dissent: The Vietnam Protests and the Words of Public Officials*, 1966 Wis. L. Rev. 632, 644-53.

at suppressing dissent; had appellant destroyed the certificate in 1962 and been indicted for willful non-possession under the then applicable law, improper congressional motive would surely not have been successfully argued. But what Congress did in 1965 only strengthened what was already a valid obligation of existing law; *i.e.*, prohibiting destruction of a certificate implements the duty of possessing it at all times. Therefore, to isolate and examine the motive of Congress in 1965 seems even less justifiable than it would ordinarily be.

We need not go so far as to say that an apparently innocuous statute can never be successfully attacked on the ground that the "real" congressional motive behind it was impermissible. We say only that the occasions cited to us where this has allegedly been done successfully are few, that they are in several ways distinguishable,[10] and that none involved a mere implementation of an already existing regulatory scheme. Under these circumstances, we decline to hold the 1965 amendment unconstitutional on its face.

Of course, this does not end the case. Appellant urges the First Amendment defense even more vigorously in his alternate argument that, as applied to the facts of this case, the statute is an unconstitutional suppression of speech. Appellant reasons as follows: Symbolic speech is protected by the First Amendment; burning a draft card in a public meeting is such symbolic speech; moreover, card-burning is a most dramatic form of communication, and there is a constitutional right to make one's speech as effec-

10. *E.g.*, in *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), the Supreme Court relied on the unfair administration of a local ordinance in reversing a conviction of Chinese laundry operators. No such contention is made here; *e.g.*, appellant does not claim that he was reclassified because he participated in a protest demonstration. See also reference to *Lamont* v. *Postmaster General* and *Grosjean* v. *American Press Co.*, *supra*, p. 3420.

tive as possible, subject to the proper constitutional standard; and, finally, whether that standard be the clear and present danger test or a balancing of interests, the statute as it was applied to him is unconstitutional.

These syllogisms require examination of basic concepts. It may be assumed that by burning his draft card, David Miller intended to communicate his ideas in an especially effective way and succeeded in doing so. Appellant relies on Supreme Court decisions protecting an individual's right to express, or refrain from expressing, an idea symbolically. Thus, *West Virginia State Bd. of Educ.* v. *Barnette,* 319 U. S. 624 (1943), held that a compulsory flag salute was an unconstitutional violation of First Amendment rights of Jehovah's Witnesses. In that case, Mr. Justice Jackson said (319 U. S. at 632-33):

> There is no doubt that . . . the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. . . . A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

Twelve years before, in *Stromberg* v. *California,* 283 U. S. 359 (1931), the Court struck down on First Amendment grounds a state statute that prohibited "the display of a red flag as a symbol of opposition by peaceful and legal means to organized government." See *Barnette, supra* at 633. See also *Carlson* v. *California,* 310 U. S. 106 (1940). Similarly, other unconventional symbolic acts have been recognized as means of communication, *e.g.,* picketing—*Thornhill* v. *Alabama,* 310 U. S. 88 (1940); civil rights sit-

ins—see *Garner* v. *Louisiana*, 368 U. S. 157, 201-02 (1961); *Brown* v. *Louisiana*, 383 U. S. 131, 141-42 (1966).[11]

But that conduct may be symbolic does not end the matter; it is only the beginning of constitutional inquiry. Is all communicative action symbolic speech and is all symbolic speech protected by the First Amendment? The range of symbolic conduct intended to express disapproval is broad; it can extend from a thumbs-down gesture to political assassination. Would anyone seriously contend that the First Amendment protects the latter?[12] Appellant would undoubtedly respond that peaceful symbolic acts, as contrasted to violent ones, are protected and that draft card burning is clearly the former. The distinction is significant, of course; it was recognized in *Milk Wagon Drivers* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287 (1941), which denied free speech protection to picketing intertwined with acts of violence. But what of other more peaceable but unconventional symbolic acts? In *People* v. *Stover, supra*, the display of offensive objects on a clothesline was a protest against high property taxes; the court held that a zoning ordinance prohibiting such conduct was constitutional.[13] What of protests made dramatic by turning on water faucets,[14] dumping of garbage in front of City

11. This characterization of a sit-in was accepted by Mr. Justice Harlan in *Garner* and by the "prevailing opinion" of Mr. Justice Fortas in *Brown* (joined in by Chief Justice Warren and Mr. Justice Douglas).

12. "Political assassination is a gesture of protest, too, but no one is disposed to work up any First Amendment enthusiasm for it." Kalven, *The Negro and the First Amendment* 133 (1965).

13. It is perhaps significant that an appeal to the Supreme Court was dismissed for want of a substantial federal question, 375 U. S. 42 (1963) The case is discussed in Comment, 64 Col. L. Rev. 81 (1964).

14. Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana*, in 1965 The Supreme Court Review 1, 11.

Hall,[15] stalling cars at an event attracting heavy traffic,[16] burning an American flag on a street corner,[17] or tearing up on television a court order or a document required to be kept under internal revenue regulations? Each such act may be designed to mobilize public opinion against an existing statute or government policy; yet, sincere motivation or the labeling of even non-violent conduct as symbolic does not necessarily transform that conduct into speech protected by the First Amendment. It may be that particular considerations surrounding a specific symbolic act justify clothing it in the concept of speech. Thus, picketing, like sit-ins, may be the poor man's printing press;[18] similarly, the technique of a "silent and reproachful presence"[19] may be the only means of true communication in certain areas of the civil rights struggle. We mention all these acts not to decide whether they are properly characterized as speech but only to emphasize the complexity of the problem. We are not at all sure that destroying a draft card even at a public rally must be regarded as an exercise of speech, but we are willing to assume it *arguendo,* as the district court did. However, this only forms the basis for further analysis. Appellant concedes that even speech may be regulated, or in certain circumstances prohibited, provided that the proper constitutional test is met; it is here that appellant contends the 1965 amendment fails.

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15. N. Y. Times, April 22, 1964, p. 1, col. 6.

16. *Id.*, August 22, 1963, p. 18, col. 2.

17. *People* v. *Street* (N. Y. C. Crim. Ct., Kings Co., July 26, 1966, appeal pending, App. T., 2d Dep't) in N. Y. Times, July 27, 1966, p. 47, col. 6.

18. Kalven, *op. cit. supra* note 12, at 133.

19. *Brown* v. *Louisiana,* 383 U. S. 131, 142 (1966) (opinion of Fortas, *J.*).

Appellant argues that since speech is involved, the statute prohibiting it must be evaluated under the clear and present danger test, which, in its classic statement, is:

> whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Schenck v. *United States*, 249 U. S. 47, 52 (1919). See also *Bridges* v. *California*, 314 U. S. 252 (1941). However, recent Supreme Court decisions have applied a balancing approach to determine the constitutionality of legislation that indirectly restricted speech. In *American Communications Assn.* v. *Douds*, 339 U. S. 382 (1950), certain unions challenged a statute that required union officials to file a non-Communist affidavit as a condition of using the services of the National Labor Relations Board. Rejecting the argument that the statute violated the First Amendment, the Court said (339 U. S. at 399):

> When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented.

More recent cases indicate the continued vitality of this balancing test. See *Konigsberg* v. *State Bar*, 366 U. S. 36, 49-51 (1961); *Communist Party* v. *Subversive Activities Control Bd.*, 367 U. S. 1, 91 (1961). See also *Barenblatt* v. *United States*, 360 U. S. 109, 126-27 (1959); *NAACP* v. *Alabama*, 357 U. S. 449, 461 (1958); *United States* v.

Aarons, 310 F. 2d 341, 345 (2d Cir. 1962). The district court apparently employed this standard. We agree that the most recent Supreme Court decisions seem to require its use, at least where a narrowly-drawn statute on its face regulates conduct, not the communication of ideas.[20]

Under this approach, the public interest to be protected is the proper functioning of the Selective Service System. In a world where resort to force is still the rule, rather than the exception, this is an interest of the highest order; its importance undoubtedly accounts for the many decisions rejecting First Amendment defenses to Selective Service violations. See *United States* v. *Kime, supra; United States* v. *Mohammed*, 288 F. 2d 236, 244 (7th Cir.), cert. denied, 368 U. S. 820 (1961); *United States* v. *Miller*, 233 F. 2d 171 (2d Cir. 1956) (*per curiam*); *Gara* v. *United States*, 178 F. 2d 38 (6th Cir. 1949), aff'd by an equally divided court, 340 U. S. 857 (1950). Indeed, we do not understand appellant to question the need for proper operation of the draft; instead he questions whether the 1965 amendment actually serves this important end. The trial court held that it did, but appellant argues that the court gave no reasons to support its conclusion and that there are none in fact.

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20. While *United States* v. *Brown*, 381 U. S. 437 (1965), reaches on a bill of attainder theory a result inconsistent with *American Communications Assn.* v. *Douds*, 339 U. S. 382 (1950), we do not regard it as a rejection of use of the balancing test in the situation before us. For a criticism of the test if used generally, see Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. J. 877, 912-14 (1963); see also Frantz, *The First Amendment in the Balance*, 71 Yale L. J. 1424 (1962); Meiklejohn, *The First Amendment Is an Absolute*, in 1961 The Supreme Court Review 245; Black, *The Bill of Rights*, 35 N. Y. U. L. Rev. 865 (1960). For more sympathetic treatment of a balancing test, see Karst, *Legislative Facts in Constitutional Litigation*, in 1960 The Supreme Court Review 75; Mendelson, *Justices Black and Frankfurter: Conflict in the Court* (1961).

We conclude that forbidding destruction of Selective Service certificates serves legitimate purposes in administering the system. To begin with, the Notice of Classification serves as proof of registration and it also contains complete information as to a registrant's classification, including the type and date thereof, and the period for which it is effective. Thus, inability to produce the card provides an easy means of initially detecting those attempting to evade their Selective Service obligations.[21] Similarly, in time of war or national emergency, it provides an instant means in a transient society of determining a registrant's fitness for immediate induction, if exigencies require it. Thus, appellant lives in New York City but is registered in Syracuse. In an extreme emergency (*e.g.*, a call-up by radio), he could be ordered to report to a local board in New York City, although that board has no record relating to appellant; only if he possessed his own Notice of Classification could his fitness for induction be determined accurately and expeditiously. Moreover, the Notice of Classification can assist a local board to reconstruct files destroyed by fire or other disaster.[22] In addition, the Notice carries a continual reminder to a registrant of his obligation to notify his local board of facts which might change his classification. The Notice also guarantees a registrant's prompt receipt of accurate information of his current status and enables him to prove it should the occasion arise. Moreover, it facilitates his personal inquiries to a local board: To provide correct information as to a registrant's present draft status, the board must know his current classification. If a registrant inquires of his own local board, the Notice furnishes this knowledge quickly

21. Forkosch, *supra* note 4, at 324-25.

22. *Ibid.*

without a search of records; if the registrant inquires of another local board in a community where he happens to be, it may be the only way he can obtain the information. To conclude, proper functioning of the system depends upon the aggregated consequences of individual acts; in raising an army no less than in regulating commerce, cf. *Wickard* v. *Filburn,* 317 U. S. 111, 127-28 (1942), the seriousness of an individual's acts must often be assessed not only in isolation but under the assumption that they may be multiplied manifold. Therefore, the interest to be served—efficient functioning of the Selective Service System—is furthered by the statute under attack.

Against these reasons must be weighed the effect of the statute on freedom of expression. Except to prohibit destruction of certificates, the statute does not prevent political dissent or criticism in any way. It is narrowly drawn to regulate a limited form of action. Under the statute, aside from destroying certificates, appellant and others can protest against the draft, the military action in Vietnam and the statute itself in any terms they wish—and indeed did so at the rally where appellant was arrested. Appellant claims, however, that the burning of a draft card is more dramatic than mere speech and that he has a right to the most effective means of communication. But surely this generalization has its own limits. In *Kovacs* v. *Cooper,* 336 U. S. 77 (1949), a conviction was affirmed under an ordinance forbidding the use on public streets of sound trucks or any other instrument which emitted a "loud and raucous" noise. To the claim that the statute unconstitutionally abridged freedom of speech, the "prevailing opinion" of the Court stated (336 U. S. at 88-89):

> That more people may be more easily and cheaply reached by sound trucks . . . is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance *when*

> *easy means of publicity are open.* Section 4 of the ordinance bars sound trucks from broadcasting in a loud and raucous manner on the streets. *There is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers.* [Emphasis added.]

We do not imply that the existence of many means of communication may ordinarily justify a ban on one of them; for example, suppression of a newspaper because radio and television are available is clearly unconstitutional. See *NLRB* v. *Fruit Packers,* 377 U. S. 58, 79-80 (1964) (Black, *J.,* concurring). We only say that in the case of the symbolic speech posed here, such a consideration is proper. See *Kovacs* v. *Cooper, supra* at 97 (Jackson, *J.,* concurring) ("The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself, and all we are dealing with now is the sound truck."). Moreover, pure speech and conduct offered symbolically as speech need not be regarded as identical. In *Cox* v. *Louisiana,* 379 U. S. 536, 555 (1965), the Court said:

> We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech. . . . We reaffirm the statement of the Court in *Giboney* v. *Empire Storage & Ice Co., supra,* at 502, that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."

See also *City of Greenwood* v. *Peacock,* 384 U. S. 808, 826-27 (1966). Viewing all of the considerations, we find that under the test applied in *American Communications Assn.* v. *Douds, supra,* and in later cases,[23] "the particular conduct [destruction of draft cards] is regulated in the interest of public order," that "the regulation results in an indirect" and minimal abridgment of "speech" and that the former "demands the greater protection under the particular circumstances presented." *Accord, United States* v. *Smith,* 249 F. Supp. 515 (S. D. Iowa 1966), appeal pending, 8th Cir. We are supported in this conclusion by the knowledge that appellant and those who agree with him remain free, as indeed they should be, to criticize national policy as vigorously as they desire by the written or spoken word; they are simply not free to destroy Selective Service certificates.

Appellant's final argument is that since the statute does not serve any rational legislative purpose the statute is an unconstitutional deprivation of individual liberty without due process of law under the Fifth Amendment. Thus, appellant points out that the 1965 amendment has been called "a silly law" in a national periodical with extensive circulation.[24] However, it is not the province of the judiciary to praise or condemn this law; our function is to determine only the power of Congress in enacting the statute, not its wisdom. For the reasons already given at length above, we find that the statute is neither arbitrary nor without purpose, that it is reasonably related to the power of Congress to raise and support armies, and that it reinforces an obligation which has been imposed upon registrants for many years. Accordingly, the judgment of conviction is affirmed.

23. See cases cited *supra,* p. 3426.

24. See Wainwright, "A Serious To-Do About a Silly Law," Life, March 4, 1966, p. 17.

Judgment of the District Court

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

No. 65 Cr. 937

UNITED STATES OF AMERICA

v.

DAVID J. MILLER

On this 15th day of March, 1966, came the attorney for the government and the defendant appeared in person, and by counsel

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and a finding of Guilty by the Court, the defendant having waived trial by jury of the offense of unlawfully, wilfully and knowingly destroying and mutilating a Notice of Classification (SSS Form No. 110) issued pursuant to the Universal Military Training and Service Act, and the rules, regulations and directions made pursuant thereto (Title 50, Appendix, U. S. Code, Section 462 (b); 32 Code of Federal Regulations, Section

1632) as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is sentenced to THREE (3) YEARS. Execution of sentence is suspended and the defendant is placed on probation for a period of TWO (2) YEARS, subject to the standing probation order of this Court and upon the following special conditions:

1—That two weeks after the filing of the judgment in this case, the defendant is required to obtain and to carry on his person at all times a draft card (SSS Form No. 110).

2—That the defendant shall obey all orders and directions of his Selective Service Board.

3—That the period of probation in this case will be terminated if as and when the defendant enters into the Military Service.

The defendant is continued on his present bail until such time as he posts bail pending appeal in the sum of $500., which bail must be posted by 4:00 P.M. March 21, 1966.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

Judgment of the District Court

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

H. R. Tyler, Jr.
United States District Judge.

John J. Olear, Jr.
Clerk.

Opinion of the District Court Denying Motion to Dismiss

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

against

DAVID J. MILLER,

Defendant.

ROBERT M. MORGENTHAU, Esq., United States Attorney, by Assistant United States Attorney
PETER FLEMING, JR. and FRANK M. TUERKHEIMER, Attorneys for the United States of America.

MARVIN M. KARPATKIN, Esq.,
RHODA H. KARPATKIN, Esq.,
OSMOND K. FRAENKEL, Esq.,
NANETTE DEMBITZ, Esq.,
MELVIN L. WULF, Esq., and
HENRY M. di SUVERO, Esq., of New York, N. Y.
Attorneys for Defendant.

TYLER, D.J.

Defendant Miller, who has been charged with knowingly destroying and mutilating his Notice of Draft Classification (SSS Form No. 110) (hereinafter "Notice") pursuant to the provisions of 50 Appendix United States Code

462(b), as recently amended by 79 Stat. 586, Public Law 89—152, August 30, 1965, moves to:

1. Dismiss the indictment, or, in the alternative, to

2. Receive a bill of particulars with regard to the charge, and to

3. Discover and inspect various documents and effects, including the charred remains of his aforesaid Notice.

For reasons to be briefly hereinafter discussed, the motion to dismiss the indictment prior to trial is denied, and the motions for particulars and discovery, as will be more specifically delineated, are granted in part and otherwise denied.

I.

Upon his motion to dismiss, Miller argues variously that: (1) the indictment fails to charge a crime against the United States; (2) the indictment effectively denies or abridges his rights to freedom of speech, assembly and exercise of political rights, all as guaranteed to him by the First, Ninth and Tenth Amendments to the Constitution of the United States; (3) the indictment effectively denies him due process of law under the Fifth Amendment because the underlying criminal statute serves no legitimate legislative purpose; and (4) the indictment would work a deprivation of his right to be free from cruel and unusual punishment as secured to him by the Fifth and Eighth Amendments.[1] All of these claimed defi-

1. Defendant's precise argument here under the Fifth Amendment is unclear; perhaps he would suggest that severe and unusual punishment would constitute a denial of substantive due process.

ciencies, as Miller is aware, must be found at this stage, if they are to be found at all, on the face of the indictment or its statutory underpinning.

A. Contention that the indictment fails to state a crime against the United States.

In order to put this contention in focus, it is necessary to indicate that defendant's basic argument consists of the following syllogism.

1. Only destruction and mutilation of a "certificate" constitutes a violation of the pertinent provision of Section 462(b).

2. A Notice of Classification is not, as a matter of fact or law, a certificate.

3. Thus, Miller's alleged destruction and mutilation of his Notice does not constitute a violation of the statute.

Simply stated, defendant's second or minor premise is erroneous. Although it may be argued that neither the provisions of Title 50 Appendix nor the regulations thereunder categorically define the Notice (SSS Form No. 110) to be a "certificate", it is plain enough from the face of Section 462(b) as a whole that Congress certainly there used the word "certificate" with intention to embrace, among other Selective Service documents, the Notice in question. *See United States* v. *Turner,* 246 F. 2d 228, at 230 (2d Cir. 1957).

With an erroneous minor premise, Miller's syllogism necessarily collapses. Beyond this, however, it should be noted that the indictment says much more than "a certificate"; it continues to allege, "to wit, a Notice of Classi-

fication (SSS Form 110), issued pursuant to the Universal Military Training and Service Act. * * *" No plainer language in full accord with the plain meaning of the pertinent provisions of Section 462(b) can be imagined; thus, defendant has ample and definite notice of the offense of which he is being charged, and he does not, as I understand him, argue to the contrary.

B. Contention that the indictment denies defendant his constittuional rights of free speech, assembly and exercise of political rights.

As defendant's counsel virtually conceded during oral argument of this motion, there is presently no firm factual basis for raising or passing upon the contentions under the First, Ninth and Tenth Amendments prior to trial of the indictment. Certainly, the statutory language on its face suggests no issues, let alone deprivations of rights, under the Amendments cited. The pertinent part of Section 462(b) simply makes it a crime to "knowingly destroy(s), knowingly mutilate(s) * * *" a Notice or other certificate. The indictment language is essentially that of the statute. Even defendant, then, must perceive that there is nothing on the face of either the statute or the indictment which remotely suggests any problem of free speech or free assembly or free exercise of political rights as guaranteed by the Constitution. Certainly not one of defendant's cited cases comes close to supporting his contentions in this area.

But Miller's lawyers attempt to avoid this obvious point by suggesting that the statute might affect speech or assembly upon certain hypothetical facts. Surely, counsel must know that federal courts cannot decide constitutional questions before they are squarely presented in the context of solidly determined, as opposed to hypothetical,

facts. See *United States* v. *Raines*, 362 U. S. 17, at 20-21 (1960). Moreover, it does no good at this early stage of the proceedings to suggest further, as defendant does, that mutilation or destruction of a Notice must be considered "symbolic speech" within the ambit of First Amendment safeguards. It can be observed that Miller's citations in support of this proposition are cases involving statutes which, largely by their terms, proscribed "symbolic speech" (e.g. *Stromberg* v. *California*, 283 U. S. 359 (1931)) or unreasonably compelled such speech (e.g. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943)) in dereliction of First Amendment protections —something which Section 462(b)(3) on its face does not appear to do.

More significant, defendant's arguments must await a development of the facts at trial. Tempting as it might be to surmise now that Miller almost certainly could effectively exercise his rights of free expression and protest, if such was his intention on the day in question, without the additional and supposedly symbolic act of destroying his card, I reject the temptation simply because it must be assumed in fairness that defendant might develop facts at trial to fairly raise the issue of whether or not his First Amendment rights have been unreasonably restricted by the application of Section 462(b)(3), no matter how rational and necessary that statute appears by its terms. See e.g., *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); concurring opinion of Harlan, J. in *Garner* v. *Louisiana*, 368 U. S. 157, at 196-207 (1961).

C. Contention that the indictment denies defendant due process of law under the Fifth Amendment.

Essentially, defendant's argument here is that the pertinent amendment to Section 462(b) serves no legitimate or rational legislative purpose. In fairness to defendant,

it might be more accurate to say that under this general contention, he argues, first, that on its face the statutory language proscribing destruction and mutilation of a Notice neither enhances nor in any way significantly effects the "economic or military capabilities of the United States", and, second, on the basis of its legislative history, the new language of Section 462(b)(3) was passed by Congress without any concern for or purpose under its war powers. To illustrate, defendant points out, *inter alia*, that destruction of a Notice in itself cannot normally preclude or significantly delay service in the armed forces by registrant, that the Selective Service System did not request such an amendment to the law and that speeches on the floor of Congress indicated beyond a doubt that, in the minds of the speaking solons at least, the new language was designed for no other purpose than to discourage critics of the government's war policies and objectives in Southeast Asia.

When called upon to decide whether or not legislation comports with necessary standards of substantive due process, the courts must "determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory." *Nebbia* v. *New York*, 291 U. S. 502, at 536 (1934). This is not to say, however, that courts should be governed by subjective views of the political wisdom of the legislative enactment in question; rather, the judicial branch can only be properly concerned with whether or not the statute under attack serves purposes reasonably related to legitimate powers of Congress under the Constitution—and that it so serves without discrimination or caprice.

On its face, the amended language of Section 462(b) meets the standards of substantive due process. As is

widely known, for example, the regulations of the Selective Service System for at least the past twenty years have required registrants to carry their Notices of Classification upon their persons. 32 C. F. R. 1617.1 and 1623.5. This circumstance alone suggests that it is by no means irrational for Congress to take the additional step of making it a crime to knowingly destroy one's Notice in order to underscore the long-established duty of a registrant to maintain continuous possession of that document. Nor does it require unusual imagination to conceive of the several desirable and perhaps in some instances crucial administrative advantages to the Selective Service officials and draft boards in a system of personal retention of classification information by each potential draftee. Conversely, it is not unreasonable to infer that advantage may accrue to an individual registrant in such continued retention of the Notice, particularly, for example, upon the not impossible occasion—almost too horrible to contemplate—of an erroneous bureaucratic assumption of a higher classification than that actually assigned by the local board and happily inscribed upon that Notice safely tucked in the registrant's wallet.

Parenthetically, although I do not read defendant's briefs to explicitly make the point, it is conceivable that his serious contention here may amount to this: Assuming that the due process test of a "rational basis" has been met for this particular legislation, this is not necessarily an adequate test with respect to possible abridgement of freedom of speech, assembly and the exercise of political rights. In other words, as has been discussed *infra* at pages 8 to 10, it is theoretically possible that legislation, valid enough upon grounds of purpose and rationality, may unnecessarily impinge upon Bill of Rights protections. See *Board of Education* v. *Barnette, supra,* at 639;

Cantwell v. *Connecticut, supra.* To be sure, in the words of Mr. Justice Black in *Giboney* v. *Empire Storage Co.*, 336 U. S. 490, at 498 (1949); "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute", and for this reason alone it can be well understood why the government here argues, not without persuasiveness, that upon no conceivable set of circumstances can Miller ever effectively establish infringement of his First Amendment privileges. Nevertheless, this potential issue must be fairly left for that day when the events and circumstances of the alleged offense have been fully developed as a result of the trial process.

Returning to the main theme, it would be easy to take notice in detail of other obvious benefits to the authorities and the public of the requirement of continuous retention by each individual of his Notice of Classification. Enough has been said, however, to make the obvious point that on its face the amended language of Section 462(b) is a reasonable exercise of the powers of Congress to raise armies in the defense of the United States. It matters not that destruction of his card will not impede the possible call-up of defendant, nor is it of any consequence that almost certainly thousands of men in recent decades, including the writer, have unwittingly failed to carry their cards at all times without ever having been called to show or produce them. See *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, at 487-88 (1955).

Most important here, what motivated members of Congress in enacting the amended provisions of Section 462(b) is irrelevant. This court must look only to the statutory language itself, particularly, where, as here, that language is simple and plain on its face. Determination of the state of mind of those legislators to whose speeches defendant

specifically points and the other members of Congress voting on this amendment is beyond the competence of this court and in any event would be a largely irrelevant exercise. *Sonzinsky* v. *United States,* 300 U. S. 506, at 513-14 (1937). Even assuming that some Congressional members possessed a state of mind or motives totally unrelated to proper legislative purposes, the point remains, as already indicated above, that the simple language of Section 462 (b)(3), as amended, clearly relates to legitimate Congressional ends under the war powers. See *McCray* v. *United States,* 195 U. S. 27 (1904); *Barenblatt* v. *United States,* 360 U. S. 109, at 132 (1959).

Finally, brief mention may be made of defendant's argument that the amending language is totally at odds with the thrust of the other and older provisions of Section 462, all of which, it is argued, are aimed at striking down fraud in the operation of the Selective Service System. From this, he infers that the new language is rendered "jarring" and unclear, thus requiring the court to look to the legislative history for construction or interpretation. Leaving aside the circumstance that Miller's cited authorities render little or no support for this ingenious assertion, it must be observed that Section 462 is the only "offenses and penalties" or "crimes" section in the Selective Service Act. Thus, Congress must be assumed to have sensibly decided not to add a new "criminal" section merely for the purpose of this brief and simple amendment. More important, it is not necessary or appropriate to look to legislative history when the language, as here, could not be plainer. *Van Camp* v. *American Can Co.,* 278 U. S. 245, at 253 (1929). Then, too, Congress certainly was mindful that knowing destruction of a Notice was closely akin to wilfull non-possession of this document, another offense long sanctioned by the same section

of the statute. 18 U. S. C. 462(b)(6), 32 C. F. R. 1623.5. In short, the 1965 amending language is by no means as "jarring" to or "far out" from the preexisting statutory scheme as claimed; thus, this and defendant's other arguments in the due process area must be found wanting.

D. Contention that the amendment to Section 462 is void as imposing cruel and unusual punishment.

As is the case with respect to all crimes spelled out in Section 462, the new offense of knowing destruction and mutilation of a Notice is a felony punishable by imprisonment up to five years and/or by a fine up to the amount of $10,000. Miller argues that this is cruel and unusual punishment barred by the Eighth Amendment. It might be interesting to explore this contention, but the government is clearly correct in urging that it is prematurely raised. No penalty has been imposed upon Miller, and none may ever be imposed. See *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1, at 104 (1961). Thus, Miller's arguments here must await the occasion, if and when it comes, of a definite sentence imposed for this offense.

Miller's various grounds for dismissing the indictment are found to be insufficient or premature, and thus his motion to dismiss prior to trial is denied.

II.

Turning to Miller's demand for a bill of particulars, the prosecution in its papers and during oral argument has consented to furnish those particulars sought in paragraphs 1, 3, 4, 5 and 14 of defendant's notice of motion. Most of the remaining demands seek to elicit the prosecution's evidence, a purpose for which a bill of particulars

normally cannot serve. Some of the demands, moreover, do not seem to relate clearly to any potential issues in the case. Thus, with one exception to be noted hereinafter, the remaining demands serve no proper function of a bill such as clarification of the charge, avoidance of surprise at trial or anticipation of a possible double jeopardy plea in the event of a subsequent criminal complaint or indictment.

The one exception, arguably doubtful as such from the government's point of view, is to be found in paragraph 2 of Miller's demand. Here in substance he requests the date of issuance of his notice, the identity of the issuing draft board and the substantive information contained upon the face of the Notice. In my view, Miller is entitled to this as a matter of simple fairness even though it is alleged that he possessed and then destroyed and thus "abandoned" the original. Such particulars before trial will establish in effect whether or not there were several Notices of Classification furnished to Miller[2] and, if so, which one it is that Miller is charged with destroying.

III.

Miller also seeks to discover and inspect the remains of the Notice which he is said to have burned or destroyed. Additionally, he seeks to inspect and copy any statements or "confessions" which he may have made in writing to the Federal Bureau of Investigation or any government agency.

Curiously, Miller has proffered no affidavit in support of these requests. The prosecutor, however, has made an affidavit stating upon information and belief that Miller burned his Notice and let the remains fall without any

2. See Miller's demand No. 17, which, in effect will thus also be answered in part by a reply to demand No. 2.

attempt to claim or recover them. Thus, as suggested heretofore, the government argues that he has abandoned and forfeited any right to ownership or possession thereof, a prerequisite under Rule 16 for the relief here sought. On the record, the government's argument is not illogical. Beyond this, however, defendant has made no showing that the remains of the Notice may be material to the preparation of his defense or that this particular request is reasonable. Largely for this reason, defendant's demand to inspect the charred remains of his Notice is denied.

As to inspection of any statements of his in writing, Miller makes no attempt to describe such in any detail. Indeed, I cannot be sure from his papers or those of the prosecution that any such written statements were taken by or given to a government agent. Particularly under these circumstances, I see no reason to abandon the usually followed rule in this circuit (see *United States* v. *Murray*, 297 F. 2d 812, at 820 (2d Cir. 1962), *cert. den.* 369 U. S. 828 (1962)) that discovery of such statements is not permissible prior to trial.

Accordingly, defendant's discovery motion is denied in its entirety, without prejudice, however, to his right to make application to the trial judge for inspection of some or all of these same materials during the trial.

An order should be settled on notice to reflect the foregoing.

Dated: New York, N. Y., December 16, 1965.

H. R. Tyler, Jr.
U. S. D. J.

Opinion of the District Court After Trial

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 Cr. 937.

UNITED STATES OF AMERICA,

against

DAVID J. MILLER.

TYLER, D.J.

This case was tried before the court sitting without a jury on February 9 and 10, 1966. At the conclusion of the trial, the court found David J. Miller guilty as charged in the indictment. In response to an inquiry from the court, defense counsel specifically waived specific findings as provided in Rule 23(c), Federal Rules of Criminal Procedure.

Indeed, the essential facts of what transpired on the day in question, October 15, 1965, at the street rally down near the Army Building at No. 39 Whitehall Street, in the City of New York, are not in dispute. The principal issue in the case was perhaps most aptly summarized by the defendant himself when, in response to a question put by him to his own counsel, he stated as follows:

> "I burned my draft card as a symbolic protest in opposition to conscription, to the Selective Service System, to the war in Viet Nam, and to the draft card burning law itself."

Immediately thereafter, Miller was asked this question and gave the following answer:

"Q. And this was done in the course of a speech which you were delivering on those subjects?
A. That's correct."

In short, the prime defense raised by the defendant to this charge, prior to, during and after trial, has been the contention that his admitted burning of his draft card was an act of symbolic speech protected in full by the First Amendment to the Constitution. In finding defendant guilty as charged, this court necessarily passed upon and overruled this defense. The reasons for this court's ruling on this issue may be said to have been adequately set forth in the opinion filed on December 16, 1965 passing upon defendant's various pre-trial motions. In the earlier opinion, for example, it was stated that the authorities cited by defendant are inapposite to the indictment on trial and to the statute on which it is based, Public Law 89-152 of August 30, 1965 (50 U. S. C. Appendix 462(b)). E.g. *West Virginia State Board of Education* v. *Barnett*, 319 U. S. 624 (1943); *Stromberg* v. *California*, 283 U. S. 359 (1931). The evidence adduced at trial does nothing to shake this conclusion. Nonetheless, it might be helpful to sharpen the discussion further and, in particular, to answer the specific arguments of defendant's able counsel as advanced by them after the proofs were completed.

As I understand defense counsel, for example, they respond to the observation that David Miller could have sufficiently expressed his opinion in opposition to conscription, the Selective Service System in general, the war in Viet Nam and the very draft card destruction statute in question without burning his card on the day in question, with the argument that the First Amendment would permit Miller to make the most dramatic and compelling speech possible, such as the symbolic event which he perpetrated, with full immunity from prosecution under this

or any other statute. A simple answer to this ingenious argument, it seems to me, is that neither the authorities cited by defense counsel nor any case that I have been able to find support the proposition that the First Amendment entitles one to full protection of the most dramatic form of speech available, especially where other adequate but less dramatic means are at hand to be used by the speaker in question. Another way of putting this would be to say that even if it is assumed *arguendo* that what Miller did on October 15th last was an act of symbolic communication, any regulation thereof results only in a partial abridgment of his freedom of speech because other or more normal forms of communication were still open to him that day. To bespeak the obvious, he could have spoken against all of the things he desired without burning his notice of classification. See *Stromberg* v. *California, supra,* at page 368; *American Communications Association* v. *Douds,* 339 U. S. 382, at page 400 (1950). First Amendment freedoms are not absolute, and their exercise often must give way to clear public or governmental interests. *American Communications Association* v. *Douds, supra,* at pages 398-99; *Brown* v. *Louisiana,* —— U. S. ——, decided February 23, 1966, at page 15 of slip opinion (dissenting opinion by Mr. Justice Black).

As a practical matter, the very evidence of what transpired at the street rally in question on October 15th demonstrates that other methods of speech—though less dramatic and shocking than Miller's action—served as reasonably effective communication of the ideas in question. Although it is true that most of the witnesses at trial agreed that David Miller got the largest proportion of cheers (and boos as well), it also seems to be beyond question that the other speakers obtained applause for their efforts—i.e. they were able to make their points to the

crowd assembled—without burning their classification cards, if such they had, or doing any other act sanctioned by a presumptively valid criminal statute. See *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, at page 498 (1949).

Miller's counsel also argue that even if the statute be assumed to serve a valid governmental purpose, it is such a limited and largely duplicative weapon in the arsenal of selective service sanctions that the court should strike a balance in favor of any First Amendment rights which happen to be impinged upon by its application. But, as indicated in this court's December 16 opinion, the governmental purpose of this statute is clear enough, and this court cannot and will not substitute its judgment for that of Congress in providing for and preserving an effective means of drafting young citizens for military service. This being so, to strike the balance in favor of Miller would be virtually to license him and others so inclined to ignore their responsibilities to the national defense requirements of this nation.

The defendant will appear for sentencing on March 15, 1966 at 2:15 p.m.

March 7, 1966.

H. R. Tyler, Jr.
U. S. D. J.

[1]

House Report No. 747

House of Representatives

89th Congress—*1st Session*

PROHIBITION OF DESTRUCTION OR MUTILATION OF DRAFT CARDS

AUGUST 9, 1965.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. RIVERS of South Carolina, from the Committee on Armed Services, submitted the following

REPORT

[To accompany H.R. 10306]

The Committee on Armed Services, to whom was referred the bill (H.R. 10306) to amend the Universal Military Training and Service Act of 1951, as amended, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of the proposed legislation is to provide a clear statutory prohibition against a person knowingly destroying or knowingly mutilating a draft registration card.

EXPLANATION OF THE BILL

Section 12(b)(3) of the Universal Military Training and Service Act of 1951, as amended, provides that a person

who forges, alters, or in any manner changes his draft registration card, or any notation duly and validly inscribed thereon, will be subject to a fine of $10,000 or imprisonment of not more than 5 years. H.R. 10306 would amend this provision to make it apply also to those persons who knowingly destroy or knowingly mutilate a draft registration card.

The House Committee on Armed Services is fully aware of, and shares in, the deep concern expressed throughout the Nation over the increasing incidences in which individuals and large groups of individuals openly defy and encourage others to defy the authority of their Government by destroying or mutilating their draft cards.

While the present provisions of the Criminal Code with respect to the destruction of Government property may appear broad enough [2] to cover all acts having to do with the mistreatment of draft cards in the possession of individuals, the committee feels that in the present critical situation of the country, the acts of destroying or mutilating these cards are offenses which pose such a grave threat to the security of the Nation that no question whatsoever should be left as to the intention of the Congress that such wanton and irresponsible acts should be punished.

To this end, H.R. 10306 makes specific that knowingly mutilating or knowingly destroying a draft card constitutes a violation of the Universal Military Training and Service Act and is punishable thereunder; and that a person who does so destroy or mutilate a draft card will be subject to a fine of not more than $10,000 or imprisonment of not more than 5 years.

House Report No. 747

COMMITTEE POSITION

The Committee on Armed Services, a quorum being present, by a vote of 19 to 1 agreed to favorably report H.R. 10306 to the House of Representatives.

FISCAL DATA

Enactment of this legislation will not involve the expenditure of any Federal funds.

CHANGES IN EXISTING LAW

In compliance with paragraph 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill are shown as follows (changes in existing law are printed in italic):

SECTION 462(b)(3) OF TITLE 50, UNITED STATES CODE

462. Offenses and penalties

(a) * * *

(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title, or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys, knowingly mutilates* or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints,

or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title, or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to [3] exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury.

PROHIBITION OF DESTRUCTION OR MUTILATION OF DRAFT CARDS

Mr. RIVERS of South Carolina. Mr. Speaker, I ask unanimous consent that the Committee of the Whole House on the State of the Union be discharged from further consideration of the bill (H.R. 10306) to amend the Universal Military Training and Service Act of 1951, as amended, and for its immediate consideration.

The Clerk read the title of the bill.

The SPEAKER. Is there objection to the request of the gentleman from South Carolina?

There was no objection.

The Clerk read the bill, as follows:

H.R. 10306

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the [19135] Universal Military Training and Service Act, as amended, is hereby further amended as follows:

SECTION 1. Section 12(b)(3) is amended to read as follows:

"(3) who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or".

Mr. GROSS. Mr. Speaker, I move to strike the last word.

I believe we should have an explanation of the bill.

Mr. RIVERS of South Carolina. Mr. Speaker, will the gentleman yield?

Mr. GROSS. I yield to the gentleman from South Carolina.

Mr. RIVERS of South Carolina. Mr. Speaker, the bill, H.R. 10306, amends the Universal Military Training and Service Act to establish a clear statutory provision against a person knowingly destroying or knowingly mutilating a draft card. Existing law provides a penalty for anyone forging or altering a draft card, but there is no specific prohibition against destroying or mutilating a draft card.

The purpose of the bill is clear. It merely amends the draft law by adding the words "knowingly destroys and knowingly mutilates" draft cards. A person who is convicted would be subject to a fine up to $10,000 or imprisonment up to 5 years. It is a straightforward clear answer to those who would make a mockery of our efforts in South Vietnam by engaging in the mass destruction of draft cards.

We do not want to make it illegal to mutilate or destroy a card per se, because sometimes this can happen by accident. But if it can be proved that a person knowingly destroyed or mutilated his draft card, then under the committee proposal, he can be sent to prison, where he belongs. This is the least we can do for our men in South Vietnam fighting to preserve freedom, while a vocal minority in this country thumb their noses at their own Government.

Mr. GROSS. Mr. Speaker, the gentleman from South Carolina in his usual lucid manner has convinced me that this is a very good bill, and I am ready and willing and able to withdraw my reservation.

Mr. BRAY. Mr. Speaker, I move to strike out the last word.

(Mr. BRAY asked and was given permission to revise and extend his remarks.)

Mr. BRAY. Mr. Speaker, the bill that we have before us today is simple and easy to understand. H.R. 10306 is an

amendment to our selective service law providing that it is illegal to knowingly mutilate or destroy a draft card. It is already illegal to alter, forge or change such a card.

The need of this legislation is clear. Beatniks and so-called "campus-cults" have been publicly burning their draft cards to demonstrate their contempt for the United States and our resistance to Communist takeovers. Such actions have been suggested and led by college professors —professors supported by taxpayers' money.

At Rutgers University, Prof. Eugene Geonese [Genovese], who prides himself on being a Marxist, publicly said that he "welcomed a Communist Vietcong victory." The board of governors refused to dismiss him.

Just yesterday such a mob attacking the United States and praising the Vietcong attempted to march on the Capitol but were prevented by the police from forcibly moving into our Chambers. They were led by a Yale University professor. They were generally a filthy, sleazy beatnik gang; but the question which they pose to America is quite serious.

These so-called "student" mobs at home and abroad make demands and threats; they hurl rocks and ink bottles at American buildings; they publicly mutilate or burn their draft cards; they even desecrate the American flag. Chanting and screaming vile epithets, these mobs of so-called "students" and Communist "stooges" attempt to create fear and destroy self-confidence in our country and its citizens and to downgrade the United States in the eyes of the world.

Such organized "student" groups in the United States have sent congratulations and money to Ho Chi Minh and have made anonymous and insulting calls to families of our servicemen killed in Vietnam.

This proposed legislation to make it illegal to knowingly destroy or multilate a draft card is only one step in

bringing some legal control over those who would destroy American freedom. This legislation, if passed, will be of some assistance to our country if the officers and courts charged with the enforcement of the law will have the energy, courage, and guts to make use of it.

The growing disrespect for our law and institutions in America holds a real threat to our country and to our freedom. Just 5 short years ago no one would have believed that disrespect for our country could have grown to the proportions that it has today.

Disrespect for our American heritage and anti-American demonstrations are all a part of the cold war in some way directed by those who would destroy us. The Communist world is aware that it cannot destroy the effectiveness of the United States by the use of its economic and military strength, because we are far stronger in these fields than it is and we outdistance it more every year.

Then how is the Communist victory to be brought about? The Communists are planning to use the "Judas goats" to lead those who are free to defect from freedom. So-called "students" and Communist stooges here and abroad, by demonstrations of anti-American feeling, by belittling, and by vilification are to downgrade the United States in the eyes of the world and shake the confidence and faith of our citizens in our democratic way of life. They hope to attain victory over freedom by subversion within the United States and by erosion of our national pride and confidence in the greatness of America and our national heritage.

One of America's greatest sources of strength in discouraging these demonstrations is to pause and consider the greatness of America—to appreciate what our country has done for the benefit of mankind. Let us have a rebirth of patriotism. Let us be proud, possessed not of an arrogant pride, but a humble pride in our greatness, in our heritage.

Aside from becoming the strongest country economically and militarily during the last quarter century, this country, without any desire to gain a square foot of territory, has been the principal force in overthrowing the armed might of Hitler and Japan. The strength of the United States saved both Europe and Asia from the despotic rule of tyrants. We asked nothing in return. We asked no gain for this victory brought about by American dollars, American production, and American youth. The people of the United States have unselfishly contributed more to the feeding, care, welfare, and rehabilitation of the world than has all of the rest of the world combined. All of this has been done without any thought of gain except the reward of the deed itself.

The United States, without hope of personal gain, blocked the Communist takeover of South Korea and today is assuming the major role of blocking Communist slavery in southeast Asia. Yet there are today those in America who are weak at heart, those of little faith in the greatness of America and freedom, those who are naive and refuse to face up to the realities of Communist aggression. There are those who in various degrees and for various reasons ask our Government to yield more and more to Communist aggression.

Our Government, through fear of the public opinion at home and abroad of our enemies, is failing to adequately enforce our laws on subversion and antigovernmental attacks. That is exactly as our enemies have planned it. In the exercise of our great ideals of fairness and tolerance, we seem to forget that it is axiomatic that a goverment must protect its citizenry against illegal acts and against mob violence. When decent, productive people are forced to support and coddle criminals and other dregs and drones of society, chaos, degradation, and ruin are inevitable.

Tolerance ceases to be a virtue when it condones evil. Governmental tolerance ceases to be a virtue when it allows mob violence on the law-abiding members of its society—when it winks at unlawful disrespect to its institutions and the flag. This is true whether this tolerance is the result of apathy, a maudlin sympathy, or a fear of the opinions of enemies.

When the mob once learns that its actions will lead to granting of its demands and its actions are condoned, there is a multiplication both of its demonstrations, riots, and wanton destruction, and of its demands.

If these "revolutionaries" are permitted to deface and destroy their draft cards, our entire Selective Service System is dealt a serious blow.

Mr. Speaker, I strongly urge all my fellow Members to support this legislation.

[19136] The SPEAKER. The question is on engrossment and third reading of the bill.

The bill was ordered to be engrossed and read a third time and was read the third time.

The SPEAKER. The question is on passage of the bill.

The question was taken.

Mr. HALL. Mr. Speaker, I object to the vote on the ground that a quorum is not present and make the point of order that a quorum is not present.

The SPEAKER. Evidently a quorum is not present.

The Doorkeeper will close the doors, the Sergeant at Arms will notify absent Members, and the Clerk will call the roll.

The question was taken; and there were—yeas 393, nays 1, not voting 40, as follows:

[Roll No. 230]

YEAS—393

Abbitt
Abernethy
Adair
Addabbo
Albert
Anderson, Ill.
Anderson, Tenn.
Andrews, George W.
Andrews, Glenn
Andrews, N. Dak.
Annunzio
Arends
Ashbrook
Ashley
Ashmore
Aspinall
Ayres
Baldwin
Bandstra
Baring
Barrett
Bates
Battin
Beckworth
Belcher
Bell
Bennett
Berry
Betts
Bingham
Blatnik
Boggs
Boland
Bolling
Bolton
Bow
Bray
Brock
Brooks
Broomfield
Brown, Calif.
Broyhill, N. C.
Broyhill, Va.
Buchanan
Burke
Burleson
Burton, Calif.
Burton, Utah
Byrne, Pa.
Byrnes, Wis.
Cabell
Callan
Callaway
Carey
Casey
Cederberg
Celler
Chamberlain
Chelf
Clancy
Clark
Clausen, Don H.
Clawson, Del.
Cleveland
Clevenger
Cohelan
Collier
Conte
Cooley
Corbett
Corman
Craley
Cramer
Culver
Curtin
Curtis
Daddario
Dague
Daniels
Davis, Ga.
Davis, Wis.
Dawson
de la Garza
Delaney
Dent
Denton
Derwinski
Devine
Dickinson
Dingell
Dole
Donohue
Dorn
Dow
Dowdy
Downing
Dulski
Duncan, Oreg.
Duncan, Tenn.
Dwyer

Dyal
Edmondson
Edwards, Ala.
Edwards, Calif.
Ellsworth
Erlenborn
Evans, Colo.
Everett
Fallon
Farbstein
Farnsley
Farnum
Fascell
Feighan
Findley
Fino
Fisher
Flood
Flynt
Fogarty
Foley
Ford, Gerald R.
Ford, William D.
Fountain
Fraser
Frelinghuysen
Friedel
Fulton, Pa.
Fulton, Tenn.
Fuqua
Gallagher
Garmatz
Gathings
Gettys
Giaimo
Gibbons
Gilbert
Gilligan
Gonzalez
Goodell
Grabowski
Gray
Green, Pa.
Greigg
Grider
Griffin
Griffiths
Gross
Grover
Gubser
Gurney
Hagan, Ga.
Hagen, Calif.
Haley
Hall
Halleck
Halpern
Hamilton
Hanley
Hanna
Hansen, Idaho
Hansen, Iowa
Hansen, Wash.
Hardy
Harris
Harsha
Harvey, Ind.
Harvey, Mich.
Hathaway
Hébert
Hechler
Helstoski
Henderson
Herlong
Hicks
Holifield
Holland
Horton
Howard
Hull
Hungate
Huot
Hutchinson
Ichord
Jacobs
Jarman
Jennings
Joelson
Johnson, Calif.
Johnson, Okla.
Johnson, Pa.
Jonas
Jones, Ala.
Jones, Mo.
Karsten
Karth
Kastenmeier
Kee
Keith
Kelly
King, Utah
Kirwan
Kluczynski
Kornegay

Krebs
Kunkel
Laird
Landrum
Langen
Latta
Leggett
Lennon
Lipscomb
Long, La.
Long, Md.
Love
McClory
McCulloch
McDade
McDowell
McEwen
McFall
McGrath
McMillan
McVicker
Macdonald
MacGregor
Machen
Mackay
Mackie
Madden
Mahon
Mailliard
Marsh
Martin, Ala.
Martin, Mass.
Martin, Nebr.
Mathias
Matsunaga
Matthews
May
Meeds
Michel
Miller
Mills
Minish
Mink
Minshall
Mize
Moeller
Monagan
Moore
Morehead
Morgan
Morris
Morse
Morton
Mosher
Moss
Multer
Murphy, Ill.
Murphy, N. Y.
Murray
Natcher
Nedzi
Nelsen
Nix
O'Brien
O'Hara, Ill.
O'Hara, Mich.
O'Konski
Olsen, Mont.
Olson, Minn.
O'Neal, Ga.
O'Neill, Mass.
Ottinger
Passman
Patman
Patten
Pepper
Perkins
Philbin
Pickle
Pike
Poage
Poff
Powell
Price
Pucinski
Purcell
Quie
Quillen
Race
Randall
Redlin
Reid, Ill.
Reid, N. Y.
Reifel
Reinecke
Resnick
Reuss
Rhodes, Ariz.
Rhodes, Pa.
Rivers, S. C.
Rivers, Alaska
Roberts
Robison
Rodino
Rogers, Colo.

Rogers, Fla.
Rogers, Tex.
Ronan
Rooney, N. Y.
Rooney, Pa.
Roosevelt
Rosenthal
Rostenkowski
Roudebush
Roush
Rumsfeld
Satterfield
St. Germain
St. Onge
Saylor
Scheuer
Schisler
Schneebeli
Schweiker
Secrest
Selden
Senner
Shipley
Shriver
Sickles
Sikes
Sisk
Skubitz
Slack
Smith, Calif.
Smith, Va.
Springer
Stafford
Staggers
Stalbaum
Stanton
Steed
Stephens
Stratton
Stubblefield
Sweeney
Talcott
Taylor
Teague, Calif.
Teague, Tex.
Tenzer
Thompson, N. J.
Thompson, Tex.
Thomson, Wis.
Todd
Trimble
Tunney
Tuten
Udall
Ullman
Utt
Van Deerlin
Vanik
Vigorito
Vivian
Waggonner
Walker, Miss.
Walker, N. Mex.
Watkins
Watson
Watts
Weltner
Whalley
White, Idaho
White, Tex.
Whitener
Whitten
Widnall
Williams
Wilson, Bob
Wilson, Charles H.
Wolff
Wright
Wyatt
Wydler
Yates
Young
Younger
Zablocki

NAYS—1

Smith, N. Y.

NOT VOTING—40

Adams
Bonner
Brademas
Brown, Ohio
Cahill
Cameron
Carter
Colmer
Conable

Conyers	King, Calif.	Ryan
Cunningham	King, N. Y.	Schmidhauser
Diggs	Lindsay	Scott
Evins, Tenn.	McCarthy	Smith, Iowa
Green, Oreg.	Morrison	Sullivan
Hawkins	Pelly	Thomas
Hays	Pirnie	Toll
Hosmer	Pool	Tuck
Irwin	Roncalio	Tupper
Keogh	Roybal	Willis

So the bill was passed.

The Clerk announced the following pairs:

Mr. Keogh with Mr. Brown of Ohio.
Mr. Roncalio with Mr. Pelly.
Mr. Toll with Mr. Lindsay.
Mr. Colmer with Mr. Carter.
Mr. Roybal with Mr. Hosmer.
Mr. Pool with Mr. Cunningham.
Mrs. Sullivan with Mr. Tupper.
Mr. Thomas with Mr. King of New York.
Mr. Morrison with Mr. Conable.
Mr. King of California with Mr. Pirnie.
Mr. Hays with Mr. Ryan.
Mr. Brademas with Mr. Diggs.
Mr. McCarthy with Mr. Conyers.
Mr. Tuck with Mrs. Green of Oregon.
Mr. Hawkins with Mr. Irwin.
Mr. Smith of Iowa with Mr. Scott.
Mr. Evins of Tennessee with Mr. Adams.
Mr. Cameron with Mr. Bonner.
Mr. Willis with Mr. Schmidhauser.

The result of the vote was announced as above recorded.

The doors were opened.

A motion to reconsider was laid on the table.

MUTILATION OR DESTRUCTION OF DRAFT CARDS SHOULD BE A CRIMINAL OFFENSE

Mr. THURMOND. Mr. President, recently the public and officials of our country have been appalled by reports of mass public burnings of draft registration cards. It is not fitting for our country to permit such conduct while our people are giving their lives in combat with the enemy.

The law now makes it a criminal offense to forge or alter a draft registration card. Certainly it should be just as serious an offense to mutilate or destroy a draft card.

Last week, the chairman of the Armed Services Committee in the House of Representatives introduced a bill to make the mutilation or destruction of a draft card a criminal offense. In order that this matter may be expedited in the Senate, I send to the desk a similar bill and ask that it be appropriately referred. It is my hope that hearings will be held promptly and expedtiously on this proposal.

The PRESIDING OFFICER. The bill will be received and appropriately referred.

The bill (S. 2381) to amend the Universal Military Training and Service Act of 1951, introduced by Mr. THURMOND, was received, read twice by its title, and referred to the Committee on Armed Services.

Senate Report No. 589

[1]

Senate—Calendar No. 572

89th Congress—*1st Session*

PROHIBITION OF DESTRUCTION OR MUTILATION OF DRAFT CARDS

AUGUST 12, 1965.—Ordered to be printed

Mr. THURMOND, from the Committee on Armed Services, submitted the following

REPORT

[To accompany S. 2381]

The Committee on Armed Services, to which was referred the bill (S. 2381) to amend the Universal Military training and Service Act, as amended, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

AMENDMENT

The amendment is as follows:

Strike out lines 5 and 6 and substitute in place thereof the following:

SECTION 1. Section 12(b)(3) is amended to read as follows:

Senate Report No. 589

EXPLANATION OF AMENDMENT

The amendment is a technical one to correct the designation of the section to be amended.

PURPOSE

This bill would make a person who knowingly destroys or knowingly mutilates a draft registration card subject to a fine of not more than $10,000 or imprisonment of not more than 5 years, or both.

EXPLANATION OF THE BILL

Section 12(b)(3) of the Universal Military Training and Service Act of 1951, as amended, provides, among other things, that a person who forges, alters, or changes a draft registration certificate is subject to a fine of not more than $10,000 or imprisonment of not more than 5 years, or both. There is no explicit prohibition in this section against the knowing destruction or mutilation of such cards.

[2] The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies.

For a person to be subject to fine or imprisonment the destruction or mutilation of the draft card must be "knowingly" done. This qualification is intended to protect persons who lose or mutilate draft cards acidentally.

CHANGES IN EXISTING LAW

In compliance with subsection 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law proposed to be made by the bill are shown as follows (new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

Senate Report No. 589

SECTION 462(b)(3) OF TITLE 50, UNITED STATES CODE

462. Offenses and penalties

(a) * * *

(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title, or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title, or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury.

AMENDMENT OF THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT OF 1951, AS AMENDED

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 573, H.R. 10306.

The PRESIDING OFFICER. The bill will be stated by title.

The LEGISLATIVE CLERK. A bill (H.R. 10306) to amend the Universal Military Training and Service Act of 1951, as amended.

The PRESIDING OFFICER. Is there objection to the present consideration of the bill?

There being no objection, the Senate proceeded to consider the bill.

Mr. THURMOND. Mr. President, yesterday the Senate Committee on Armed Services unanimously reported Senate bill 2381. H.R. 10306 is identical with S. 2381, as amended. Since the bills are identical, I should like to make a statement on the pending bill.

The bill amends the Universal Military Training and Service Act, which appears in the appendix to title 50 of the United States Code, to include a clear statutory prohibition against any person knowingly destroying or knowingly mutilating a draft card. The existing law already provides prohibition against the altering of a draft card as well as a number of offensives [sic] connected with the selective service registration, but there now is no specific prohibition against the willful destruction or mutilation of a draft card.

Recent incidents of mass destruction of draft cards constitute open defiance of the warmaking powers of the Government and have demonstrated an urgent need for this legislation.

The criminal prohibitions instituted by this bill would be limited to willful incidents. The prohibition would not apply to instances where draft cards were destroyed or mutilated by inadvertence.

The President has acknowledged that our country is engaged in a war. Attempts to interfere with the Universal Military Training Act or service in the Armed Forces constitute treason in time of war. Such conduct as public burnings of draft cards and public pleas for persons to refuse to register for their draft should not and must not be tolerated by a society whose sons, brothers, and husbands are giving their lives in defense of freedom and countrymen against Communist aggression.

The PRESIDING OFFICER. The bill is open to amendment. If there be no amendment to be proposed, the question is on the third reading of the bill.

The bill (H.R. 10306) was ordered to a third reading, read the third time, and passed.

Mr. MANSFIELD. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. THURMOND. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. THURMOND. Mr. President, I ask unanimous consent to postpone indefinitely further consideration of Senate bill 2381.

The PRESIDING OFFICER. Without objection, it is so ordered.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 851

DAVID J. MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3–20) is reported at 367 F. 2d 72.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 1966. On November 9, 1966, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to December 12, 1966, and on December 10, 1966, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the 1965 amendment to 50 U.S.C. App. 462(b)(3), making it a crime knowingly to destroy

a Selective Service certificate, is a constitutional exercise of Congressional power.

STATUTE INVOLVED

50 U.S.C. 462(b)(3), Section 12(b)(3) of the Universal Military Training and Service Act, as amended by 79 Stat. 586 (1965), provides:

> (b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title (sections 451, 453, 454, 455, 456 and 458–471 of this Appendix), or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title (said sections), or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this

title. (said sections) or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury. [Amendment italicized.]

STATEMENT

A street rally was held with police authorization on October 15, 1965, in New York City near the United States Army Induction Center for the purpose of protesting United States foreign policy and the military draft (R. 22a, 38a, 40a, 44a, 477a).[1] Petitioner was one of the speakers at the rally. At the conclusion of his remarks and as the climax thereof, petitioner took out his Selective Service Notice of Classification and burned it in full view of the audience (R. 24a, 30a, 48a, 69a, 82a). Petitioner did not encourage others to follow his example nor did any other person burn his draft card at the meeting (R. 51a, 52a, 59a). Three days later petitioner was arrested (R. 70a). After waiving trial by jury, petitioner was convicted in the United States District

[1] "R." refers to Appellant's Appendix to his brief in the court of appeals.

Court for the Southern District of New York of knowingly destroying a Selective Service certificate in violation of Section 12(b)(3) of the Universal Military Training and Service Act, as amended on August 30, 1965, 79 Stat. 586 (pp. 2–3, *supra*). On March 15, 1966, petitioner was sentenced to a suspended three-year term of imprisonment and placed on probation for two years subject to the special conditions that he obtain and carry within two weeks a Selective Service Notice of Classification and obey the orders of his Selective Service Board (Pet. App. 22). The court of appeals affirmed.

ARGUMENT

1. One of petitioner's contentions is that the 1965 amendment here at issue, 79 Stat. 586, is unrelated to any rational legislative purpose and therefore violates the Fifth Amendment (Pet. 19). The statute does not, however, suffer from this infirmity because it is, on its face, a reasonable measure designed to facilitate the operation of the Selective Service System.[2] Selective Service certificates such as the Notice of Classification (the document which petitioner destroyed) serve useful purposes in administering the system. They facilitate communications between the holder and his local board by keeping him aware of his Selective Service number, his board's address, and his current status. They enable him to prove his draft status and remind him of his legal obligation to notify his local board of changes in his personal

[2] The power "[t]o raise and support Armies," conferred by Art. I, Sec. 8 of the Constitution, plainly authorizes Congress to establish and implement the Selective Service System.

circumstances which might alter his current classification or require changes in official records. The Notice of Classification could also aid in reconstructing a local board's files if they were ruined by some catastrophe. It also contains sufficient information to enable a local board which is not the one where the holder is registered to assign him to duty in the event of an extreme national emergency. See Forkosch, *Draft Card Burning—Effectuation and Constitutionality of the 1965 Amendment,* 32 Brooklyn L. Rev. 303, 323–325 (1966).

Well before draft-card burning became a means of protest, the Selective Service System had, by regulation, required registrants to carry their draft notices at all times. 32 C.F.R. § 1617.1. The regulation imposing that duty had been held constitutional. *United States* v. *Kime,* 188 F. 2d 677 (C.A. 7), certiorari denied, 342 U.S. 823. The very same reasons which justify the requirement that a person keep the certificate in his possession sustain legislation reasonably calculated to implement that obligation—*i.e.,* a statute making it a crime to destroy the card.

2. Petitioner's First Amendment contentions must be considered in the light of the above justification for the judgment that burning of certificates should be prohibited. The thorough opinion of the court below demonstrates persuasively (Pet. App. 8–20) that, so considered, the claim of infringement of First Amendment rights is unsound.

a. Petitioner contends that the statute is invalidated by legislative history showing that its purpose was the suppression of political dissent (Pet. 2). Cer-

tain statements on the floor of Congress appear to support this claim (see 111 Cong. Rec. 19871), but the Committee Reports in both the House and Senate (S. Rep. No. 589, 89th Cong., 1st Sess.; H. Rep. No. 747, 89th Cong., 1st Sess.) do not manifest a legislative intent to suppress speech or any other form of expression. Moreover, it is clear from decisions of this Court that the bill must be sustained if Congress has the constitutional power to enact it, irrespective of the motives for its passage.[3] *United States* v. *Doremus*, 249 U.S. 86, 93; *Barenblatt* v. *United States*, 360 U.S. 109, 132; *United States* v. *Kahriger*, 345 U.S. 22, 27–29; see *Daniel* v. *Family Security Life Ins. Co.*, 336 U.S. 220, 224.

b. Petitioner also contends that, on the particular facts of this case, the burning of his draft card constituted "symbolic speech," and that it was, therefore, impermissible under the First Amendment for him to be criminally prosecuted for such conduct (Pet.

[3] None of the several cases invoked by petitioner (Pet. 12–15) is to the contrary. Most—*e.g.*, *Lane* v. *Wilson*, 307 U.S. 268; *Grosjean* v. *American Press Co.*, 297 U.S. 233; *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449; and *N.A.A.C.P.* v. *Patty*, 159 F. Supp. 503 (E.D. Va.)—hold only that the effect of a statute seemingly passed in pursuance of constitutional authority may be scrutinized to see whether the Act is, in fact, consistent with the Constitution. Two other cases—*Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20, and *Gomillion* v. *Lightfoot*, 364 U.S. 339, hold that legislative history may be examined to determine whether a statute is really what it purports to be (*Bailey*—law denominated a tax really a penalty designed to prohibit use of child labor; *Gomillion*—Act purporting to be a redefinition of municipal boundaries really an attempt to disenfranchise Negro residents of city). But no case which we have found stands for the proposition advanced by petitioner that improper motive alone may render a federal statute unconstitutional.

15). Granting, as the court of appeals did (Pet. App. 14), the accuracy of petitioner's characterization of his acts, they did not thereby become immune from criminal prosecution. At best, the "symbolic speech" in which petitioner engaged was one of the "forms of conduct mixed with speech [that] may be regulated or prohibited" (*Cox* v. *Louisiana*, 379 U.S. 559, 563) when a legitimate governmental interest is at stake. Here, as we have demonstrated, petitioner's conduct was of a kind which the federal government had ample reason to prohibit. Petitioner is no more entitled to claim that his conduct is entitled to constitutional immunity than is an individual who, for similar "symbolic" reasons, refuses to file an income-tax return or to report for military service. Compare *People* v. *Stover*, 12 N.Y. 2d 462, 191 N.E. 2d 272, appeal dismissed for want of a substantial federal question, 375 U.S. 42, which sustained the conviction, under a municipal ordinance, of an individual who hung rags on a clothesline abutting the street as a protest against high property taxes.

c. Finally, there is no merit to petitioner's claim that this case presents the broad question of whether the "clear and present danger" test or the "balancing" test applies "in reviewing Governmental action in the area of the First Amendment" (Pet. 18–19). The court of appeals did not hold that "this Court no longer applies the clear and present danger test" (Pet. 3); it held only that when a statute "indirectly restrict[s] speech"—when it "regulates conduct, not the communication of ideas" (Pet. App. 15–16)—this Court has determined its constitutional-

ity by weighing the incidental impact on communication against the conflicting governmental interest. The question presented here is unlike the issues in cases where the clear and present danger doctrine has been applied. *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624; *Thornhill* v. *Alabama,* 310 U.S. 88; and *Stromberg* v. *California,* 283 U.S. 359, concerned constitutional challenges to statutes which were directly aimed at expression by conduct, and where the conduct itself had no harmful effect other than in its communicative aspect. The statute involved here is, as we have shown, an appropriate regulatory measure designed to preserve a document which plays an important role in the administration of the Selective Service System. The statute is violated even if the document is destroyed in privacy, with no intention of expressing protest or making any kind of communication whatever. Nor is this a case like *Wood* v. *Georgia,* 370 U.S. 375, and *Thomas* v. *Collins,* 323 U.S. 516, where the act being punished is pure verbal expression. Whatever may be this Court's standard with respect to pure speech, it is clear that the court below accurately reflected the test which has been applied to "conduct * * * intertwined with expression and association." *Cox* v. *Louisiana,* 379 U.S. 559, 563. See, *e.g., Adderley* v. *Florida,* No. 19, this Term, decided November 14, 1966.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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